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MILITARY LAW REVIEW

HEADQUARTERS, DEPARTMENT OF THE ARMY JULY 1959

PREFACE

This pamphlet is designed as a medium for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army. At no time will this pamphlet purport to define Army policy or issue administrative directives. Rather, the *Military Law Review* is to be solely an outlet for the scholarship prevalent in the ranks of military legal practitioners. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

Articles, comments, and notes treating subjects of import to the military will be welcome and should be submitted in duplicate to the Editor, *Military Law Review*, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia. Footnotes should be set out on pages separate from the text, be carefully checked prior to submission for substantive and typographical accuracy, and follow the manner of citation in the *Harvard Blue Book* for civilian legal citations and *The Judge Advocate General's School Uniform System of Citation* for military citations. All cited cases, whether military or civilian, shall include the date of decision.

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DEPARTMENT OF THE ARMY
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DA Pam 27–100–5, 1 July 1959, is changed as follows:

Delete pages 9 through 14 and substitute corrected pages 9 through 14 transmitted herewith.

By Order of *Wilber M. Brucker*, Secretary of the Army:

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General, United States Army,
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Official:

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AN OUTLINE OF SOVIET MILITARY LAW*

BY COLONEL G. I. A. D. DRAPER**

The military law of progressive states shows an uneasy compromise between the needs of discipline and of justice. The efficiency of a fighting force renders both discipline and justice indispensable. Soviet military law reflects the dilemma of these two fundamental requirements. The Soviet military legal system is further complicated by the Communist system and by the historical fact that this system was forged on the anvil of revolution. Over the years these factors have left an indelible imprint upon Soviet military law.

It will be easier to gain an insight into Soviet military law if we consider quite shortly the pattern of Soviet military administration. This administration is part of the highly complex scheme of arrangement to be found in the Soviet state. Indeed, it is not easy to ascertain which organ of government established by the Soviet Constitution actually controls the armed forces of the state. The Supreme Soviet which, according to Article 30 of the Constitution of 1936, is "the highest organ of state authority" in the U.S.S.R., and is competent to deal with matters of war and peace, does not control the armed forces. This body, consisting of well over a thousand members, meets but infrequently and indeed during the war did not meet at all. It is, nevertheless, the supreme legislative body of the U.S.S.R. according to Article 32 of the Constitution.

The Presidium of the Supreme Soviet, which conducts the affairs of the Supreme Soviet between its sessions and has a power to issue regulations in the form of edicts, probably does not control the armed forces any more than the Supreme Soviet. Indeed, its functions are largely formal and often amount to no more than reducing to formal edicts the decisions already reached by the Council of Ministers.

It is probably this latter body, defined by the Constitution as "the highest executive and administrative organ of state authority," which exercises the day-to-day control over the Soviet armed forces. This body, consisting of some 50 members, is drawn mainly from the upper hierarchy of the Communist Party. It is in fact the government of the U.S.S.R. It is entitled to enact, and does enact, decrees and regulations which we would call subordinate

* The writer wishes to express his acknowledgement to Professor Harold J. Berman's book *Soviet Military Law and Administration* (Harvard University Press, 1955) which must be considered a pioneer work on this subject. He is also mindful of the kind and valuable advice that he received from Professor Berman.

** This article was prepared from a lecture given at The Judge Advocate General's Conference held at The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, in September—October, 1958.

legislation and has control over the military organization and mobilization plans. It can appoint officers up to the rank of general. The actual work of this body is difficult to determine with precision.

This leads us to consider whether we have yet found the true focal point of control. It will be noticed that we have not yet mentioned that powerful organization of the Communist Party. Undoubtedly, the main political decisions are made within the Party organization, but the matter is rendered less straightforward by the fact that at the higher levels of the Soviet state there is a considerable blending of party and state functions because the same persons are frequently in positions of authority both in the state and in the Communist Party. At the lower and middle levels, these functions and those who exercise them tend to be sharply distinguished. It would, therefore, be advisable at this stage to deal with the place of the Communist Party in Soviet military administration, for this must always be borne in mind when anyone considers the nature and function of Soviet military law.

It is true to say that in the main the military organization has contrived to secure a substantial amount of self-government and independence, although this matter cannot be considered as finally settled. The history of the control of the armed forces by the Communist Party reflects a typical pattern of Soviet development, namely, change and vacillation, according to the policies considered advantageous at various stages in the history and development of the Soviet state. The well-known political commissars, when they were first instituted in the early days of the Revolution, represented an essential compromise between the early political needs of the revolutionary army and the urgent demand for military commanders who had had command and battle experience during the Imperial régime. The political commissar in the early days of 1917 answered the need for an ideological control existing alongside and within the command structure of the Revolutionary Army. Kerensky in his Provisional Government had established "front commissars" as early as 1917. By the following year, 1918, an Order of the People's Commissar for Defense established commissars as the direct political organs of the government in the Army. Their task was to "see to it that the Army does not become a thing apart from the entire Soviet system and that the various military establishments do not become foci of conspiracies or instruments against workers and peasants." In those days, so close was the control that all military orders of the commanders had to be countersigned by the commissars as a form of guarantee

that no counter-revolutionary activity lay behind the order. It did not mean that the commissar had to concur in all military orders issued.

In the reorganization of the Red Army that took place in 1924 under Frunze, who replaced Trotsky, and which was continued under Voroshilov in 1925, the role of the commissars was reduced to one of political education. The revolutionary army of the Bolsheviks felt it could breathe a little more easy. After the military purges of 1937, the political commissar came into his own more and ranked equal with the military commanders. Military orders were once again signed by both. One of the most interesting consequences of the disastrous Finnish campaign of 1940 was the temporary disappearance of the political commissar from the Red Army. The chaos that had ensued in that campaign was seen as directly caused by the duplication of command between the commander and the political commissar. In July 1941, one month after the German invasion, the political commissars were re-established by an Order that proved to be fatal for these individuals. Unknown to the Russians, the Germans in May of 1941 before the invasion of Russia issued a Fuehrer Order to the effect that all political commissars who fell into the hands of the Germans should be ruthlessly exterminated. There is clear evidence from the captured German documents held in the Pentagon that this order was thoroughly and effectively carried out. By October of 1942, the political commissar was an institution of the past. His political tasks in the armed forces were, in future, to be carried out by the Zampolit, or political deputy commander. This functionary is today appointed by the Party and is responsible to his superior, the Zampolit at the next highest military formation. His primary task is one of political education for all ranks as well as the strengthening of the discipline in the armed forces. He has no power in command matters, but to a certain extent his role and that of the military commander are complementary. The emphasis in the modern Red Army is in marked contrast to that which was so evident in the early days of the Revolution. Then the emphasis was upon camaraderie, international socialism, and class prejudice against officers. Those who have seen the film "The Battleship Potemkin" will not have failed to notice the latter. The modern idea is to strengthen military discipline, to insist on punctilious respect for military rank, and the general observance of military law. In part, the reduced political role of the Zampolit is accounted for by the fact that something like 86.4 percent of the officers of the Red Army are now members of the Communist Party.

At the same time that the political hierarchy is represented on the military command level by the Zampolit, there is attached to each unit, from division upward, detachments of the security police (00 Section) which come under the Committee on State Security. This body is, in its turn, subordinated to the Council of Ministers. These security sections work, unlike the Zampolit, under cover and have the negative role of counter-action against subversives. By way of contrast, the Zampolit has a positive role performed in the full light, namely, the furtherance of political education and the indoctrination of Communist principles into all members of the armed forces. Immediately subordinate to the Council of Ministers, we find the Ministry of Defense which has direct control and supervision over the military commands. These commands are the military districts or army groups, the armies, the corps, the divisions, the brigades, the regiments, and battalions. At the level of each military district, there is an important body called the Military Council, consisting of three individuals, which is subordinate to the Minister of Defense and not the commander of the district. The latter is, however, chairman of the military council. These councils were set up by a statute of 1937 and have important governmental functions during a state of martial law or emergency.

If we wish to see the military organization in its entirety, we must envisage five separate strands of subordination issuing initially from the Presidium of the Supreme Soviet. There is, first, the Ministry of Defense, below which lie the military commands enumerated above. There is, secondly, the Communist Party organization which has its representatives, the Zampolits, at every command level. The Zampolit hierarchy answers ultimately to the Central Committee of the Communist Party. There are, thirdly, the Security (00) Sections which are within but not part of the military units and come ultimately under the Committee of State Security. There is, fourthly, the hierarchy of military courts reaching up to the Supreme Court of the U.S.S.R. of which there is a Military Division. The military courts are standing tribunals composed of professional military judges. They are constituted at all levels of command from division upwards. In the higher levels, these tribunals merge in the supreme judicial organ of the Soviet Union, i.e., the Supreme Court. You will notice that the military tribunals stand completely outside the command structure. Fifthly, there is the Military Procuracy, a part of the Procuracy of the U.S.S.R. and the cornerstone of the whole Soviet military law system. Military procurators are to be found at every level of command where there is a military tribunal. They are ultimately

subject to the Procurator-General of the U.S.S.R. Once again, at the highest level there is a merger with the civilian legal structure. It must be stressed that the Military Procuracy, like the military tribunal, is completely independent of the military command. The whole military law system at the same time comes under the general supervision of the civilian Ministry of Justice. Undoubtedly, these factors do secure considerable stability and objectivity to the military law system. The integration of military and civil law and their administration is also a contributing factor to this result. Yet, paradoxically, as we shall see, the military tribunals have exclusive criminal jurisdiction over all crimes committed by servicemen; something quite alien to Anglo-American principles.

If we want to know where to find the body of rules which constitute Soviet military law, we should have to turn in the first place to the Disciplinary Code of the armed forces of the U.S.S.R. established by Order of the Minister of Defense in 1946 and reissued in 1948 and 1950. This, in a sense, is the key instrument of Soviet military law and discipline. Also we would have to turn to that part of the ordinary Criminal Code of the republics published in 1952 which deals with military crimes, namely, Article 193. You will notice that military crimes form merely one part, and a very small part, of the ordinary criminal codes of the country. Here we see a convincing example of the close integration of military and civil law. Further, because military tribunals have exclusive jurisdiction over certain counter-revolutionary crimes committed by all persons, servicemen or civilians, we must turn to that part of the ordinary Criminal Codes that deals with those crimes, namely, Article 58. Finally, we would have to turn to the Statute governing military courts and procedure published in 1940, which is the basic legal instrument defining the jurisdiction of the military tribunals, their procedure, and the functions of the Military Procuracy. It will be clear from what has been said above that the Soviets have a uniform code of military and civilian law applicable to all members of the forces—land, sea, and air. These then are the main instruments in which Soviet military law is to be found, and each requires some examination.

Since the Revolution, four main disciplinary codes have appeared. They mark the main phases in the history of the Red Army. The first was in 1919 and was issued by Trotsky during the Revolutionary War. The second appeared in 1925 and was part of the reorganization of the army during the so-called period of stability. The third was issued by Timoshenko in 1940 after the Finnish campaign. The fourth and last, which is still in effect,

appeared in 1946 and has been republished in 1948 and 1950. These codes reflect very strongly the diminishing emphasis upon the class struggle and the increasing emphasis upon patriotism and personal responsibility of the servicemen. Equally strongly, they emphasize to the degree of severity the duty of obedience, even to the detriment of the rights of an accused serviceman. There is also a marked increase in the nature, number, and severity of the penalties imposed. Similarly, the procedure can only be described as harsh but effective.

On reading through the present code, one is struck at once by the considerable disciplinary powers conferred upon noncommissioned officers and by the elaborate system of conferring specific disciplinary powers upon particular ranks. Also one cannot fail to be impressed by the elaborate system of rewards for good service conferred by the same disciplinary code which imposes harsh penalties for disobedience. The old revolutionary ideas of discipline and hostility to the officer status have gone. It is a far cry to the time of Kerensky's reforms in 1917 when officers were elected. Lenin in 1920 marked the changing tone in military discipline. "A war is a war," he said, "and it demands an iron discipline." In other words, the change in the disciplinary codes, as we can see from a study of the texts, is from a political to a military emphasis. One way of estimating this change of emphasis is to compare the text of the Military Oath established in April 1918 with that introduced in January 1939. The Military Oath of 1918 contained the following declaration: "I, son of the toiling people and citizen of the Soviet Republic, take to myself the title of warrior of the Workers' and Peasants' Army. . . . I pledge myself to observe revolutionary discipline strictly and resolutely and to fulfil without demur all orders of commanders appointed by the Workers' and Peasants' Government. . . . I pledge myself at the first call of the Workers' and Peasants' Government to come forward to the defense of the Soviet Republic against all dangers and assaults on the part of all enemies and in the struggle for the Russian Soviet Republic and for the cause of socialism and the brotherhood of peoples to spare neither my strength nor my life itself. If by evil intent I depart from this my solemn pledge, then let universal scorn be my lot and let the hard hand of the revolutionary law finish me."

The Military Oath as revised in 1947 affords an interesting contrast: "I, a citizen of the U.S.S.R. entering the ranks of the Armed Forces, take an oath and solemnly swear to be an honourable, brave, disciplined and alert warrior, strictly to guard military and state

secrets, to fulfil without demur all military codes and orders of commanders and superiors. . . . I am always ready at the order of the Soviet Government to come forward to the defense of my Motherland—the U.S.S.R., and as a warrior of the Armed Forces, I swear to defend it manfully, ably, with dignity and honour, not sparing my blood and my life itself for achieving full victory over enemies. If by evil intent I break this my solemn oath, then may the hard penalty of the Soviet law, and the universal hatred and contempt of the toilers overtake me."

We cannot fail to notice how the modern oath stressed the military, as opposed to the political, qualities and duties of the good Soviet serviceman. Not only is this oath read aloud by the servicemen on ceremonial occasions, but it is frequently invoked as an important legal basis for military prosecutions. Neither the educational nor the legal and traditional value of the military oath has been lost upon the political and military leaders of the Soviet Union. Indeed, a number of the articles in the disciplinary code of 1946 are identical with those of the old Imperial Disciplinary Code of 1869 including Article 1 which sets the tone of the whole code. This article reads: "Military discipline is the strict and exact observance by all servicemen of the order and rules established by laws and military codes." Even stranger is the appearance in the code of 30 detailed provisions for courts of honour for officers. This part of the code must be considered as coming from the Imperial days when it was borrowed from the German system. In the *London Economist* of August 16, 1958, the most recent tendencies concerning courts of honour are described. Mr. Khrushchev is proposing to extend the system of courts of honour to all ranks under the guise of "comradely courts." This seems part of a plan in present day Soviet Russia to restrict some of the many privileges attached to the officer status.

The duty to obey remains the main strand in any military law system and receives emphatic stress in Article 6 of the Disciplinary Code. "The order of the commander shall be law for the subordinate. An order must be executed without reservation, exactly and promptly." A more remarkable feature follows in the next article. "In case of special disobedience or resistance of a subordinate, the commander is obliged to take all measures of compulsion, and in an extreme case, which does not permit delay, to use weapons; the commander shall report such an extraordinary occasion immediately through service channels." This is a mitigation of an analogous but somewhat harsher provision that prevailed in wartime. Article 7 provides that "a commander who does

not take active measures for the restoration of order and discipline shall bear responsibility for that."

The Disciplinary Code deals in the main with those infractions of discipline which do not merit trial before a military tribunal, or what we would call disciplinary or summary offenses. The salient Article 18 provides that "for a violation of military discipline or of the general order a serviceman must be subjected to disciplinary penalty if the offense committed by him does not involve being arraigned in court." This is the Soviet version of the "Devil's Article" to be found in Article 134 of the Uniform Code of Military Justice and Section 69 of the British Army Act, 1955.

Some offenses are punishable either by court-martial or by disciplinary proceedings, e.g., certain military crimes under the Criminal Code, Article 193, e.g., breach of an order. The question as to which method is to be adopted depends upon whether there are extenuating or aggravating circumstances. In the former case, the Disciplinary Code applies. If there are aggravating circumstances, e.g., the offense was committed in combat, then it is a matter for a military tribunal. The decision in the matter lies directly in the discretion of the commander of the unit concerned, which in some ways is a parallel of the Anglo-American system.

The actual penalties that may be imposed under the Disciplinary Code are not unlike those of the 1869 Imperial Code and are carefully graduated according to the rank of the accused, e.g., for privates the penalty goes up to confinement for 20 days and, for officers, confinement for 20 days and reduction in rank. On the other hand, where the accused is an admiral or general the penalties are limited to warning, reprimand, demotion in command or reduction in rank. The commander of a squad or a gun, and the master sergeant of a section may: reprimand, award extra work to privates, and deprive of one pass out of barracks or ship. It must be emphasized that the right to use weapons conferred by Article 7 in cases of grave disobedience which do not permit delay is *not* a disciplinary penalty. All disciplinary penalties must be imposed within five days of the offense and must be proportionate to the offense. A superior who exceeds his disciplinary powers may be subjected to disciplinary penalties or, in a grave case, to trial. The right of complaint arises only when the superior has acted beyond his powers. The party punished cannot complain of severity within those powers. Complaints must be entered in writing in a Book of Complaints, and there are elaborate provisions to ensure that the commanders do not tamper with the entries. In the latter part of the Code, we find detailed provisions for the conferring of

rewards on all ranks for meritorious service. These rewards may take the form of a removal of a disciplinary penalty previously imposed, extra leave, money gifts, or the placing of a photograph of the individual in front of the banner of the unit and notification to his hometown of his meritorious services. By Article 105, a serviceman is placed under a legal duty to report misapplication of service property and funds, and if loss is thereby stopped he is eligible for a reward.

The courts of honour for the trial of officers are convened by regimental commanders and senior commanders. They sit in public and the accused is present. The court is elected annually by a secret ballot of the assembly of officers of the formation and who have the appropriate seniority. The punishments that may be awarded are admonition or recommended demotion, deferment of promotion, transfer or retirement.

When we come to military crimes, we are at once dealing with the ordinary criminal codes common to the constituent republics of the U.S.S.R. Thus, the military criminal law is part of the ordinary criminal law and in the main is governed by the same procedural system and general principles of responsibility. In the last resort, the cases will be determined by the Supreme Court of the U.S.S.R. Article 58 of the Code deals, *inter alia,* with military treason which is defined as "any act committed by a citizen of the U.S.S.R. to the damage of the military might of the U.S.S.R., of its political independence or the inviolability of its territory, e.g., espionage, flight beyond the border, etc." The penalties for such grave acts are normally publicized in the West. The other military crimes are social defense," and confiscation of all property. This emphasis on confiscation of property appears in the military code and is an interesting sidelight on certain aspects of communist life not normally death by shooting, described as "the highest measure of social defense," and confiscation of all property. This emphasis on confiscation of property appears in the military code and is an interesting sidelight on certain aspects of communist life not normally publicized in the West. The other military crimes are provided for in Article 193, e.g., evasion of service, insubordination, crimes against military property, breach of guard duty, disclosure of military secrets, abuse of official position, battle crimes, that is, unjustified retreat, etc., and violation of international conventions relating to prisoners and wounded. As well as these crimes, there are the serious counter-revolutionary crimes defined in Article 58 of the criminal codes which apply to all persons, service and civilian, whereas the military crimes are limited to servicemen

only. The severity of these Article 58 offenses is seen in the provision that in the case of flight beyond the border by a serviceman "any other adult member of the traitor's family who lived with him or was supported by him at the time the crime was committed shall be subject to deprivation of electoral rights and to deportation to remote regions of Siberia for five years."

In the main, the emphasis in the criminal codes is subjective and based upon the idea of fault, i.e., *mens rea* or negligence, but the objective test is still discernible. Originally, the Soviet considered that the maxim, "no crime, no punishment, without a law," was a bourgeois idea, but as so often in Soviet Russia there has been a complete change in legal theory. Today, the general principle of criminal liability is "no crime, no punishment, without a law, without fault, without cause." In this respect, they have gone even further than some Western systems of law.

It is not proposed to deal with military crimes in detail. Suffice it to say in this context that absences of more than 24 hours amount to desertion and in wartime are punishable by shooting and confiscation of property. For absence up to two hours on a second offense or over two hours and up to 24 hours on a first offense, the accused may be sent to a disciplinary battalion for periods varying from two months to two years. It should be stated at this stage that evasion of call-up is a serious offense and that conscientious objection, particularly on religious grounds, is not allowed. A Soviet military lawyer has stated this principle in these succinct terms: "In the Soviet Union where every honourable citizen considers it his sacred duty to defend his Motherland with weapon in hand, where the huge growth of enlightenment and culture stands against religious and any other survivals, religious and other convictions may not serve as a basis for liberation from military service or from individual military duties." The crime of failing to carry out an order given in the course of military service extends to any order, although the commentaries make the qualification that the order must not be obviously criminal. No guidance can be obtained on this point, but it is clear that all orders by a commander are considered to be in the course of service. Should the order be criminal and the subordinate know it, then he is guilty if he complies.

Under Soviet criminal law, the instigators and the abettors as well as the actual perpetrators of the crime are all equally punishable. This principle applies to military crimes. One strange result of this principle is that mutiny is not a specific military crime. All the "mutineers" are but accomplices in the crime of insubordination, e.g., failure to execute an order or resisting a superior. The

complicity makes the insubordination an aggravated offense and a still further aggravation occurs if this complicity is the outcome of a preconceived agreement. The degree of aggravation is reflected in the penalty that may be imposed. Mutiny, which was the original military crime in the English Mutiny Act of 1689, is thus in Soviet military law no crime as such.

The battle crimes are punished with extreme severity and, if committed with intent to assist the enemy, amount to military treason and are punishable by death. Finally, it should be pointed out that the serviceman is also liable to be convicted for the nonmilitary crimes listed in the criminal codes but he may be tried therefor only by military tribunals. With regard to the penalties, the death penalty is now attracted by some 16 crimes including aggravated murder. This is the only nonmilitary and nonpolitical offense to attract that penalty. Apart from imprisonment which may extend to 25 years and is normally spent in labor camps, a serviceman may be subjected to deprivation of civil rights, confiscation of property, liability to make compensation for injury, forfeiture of rank and service in disciplinary or penal battalions. This latter punishment is an old Russian institution and was in regular use under the Tsars. In the recent war, it was much used. Officers may be degraded and sent to such units. After Stalin's famous order of July 1942, known as the "not a step backward order," generals were broken to privates, then transferred to penal units and sentenced to death by shooting. Such methods give point to the remark made by Marshal Zhukov to General Eisenhower in 1945, "you have to be a brave man to be a coward in the Soviet Army."

Alongside this extreme severity, one finds the inevitable Russian vacillation expressed in the system of amnesties. An amnesty was granted in 1945 and a further one in 1953 under Malenkov. Both are considered to have been carried out in most cases. The latter amnestied all those sentenced to not more than five years' deprivation of freedom and remitted half of all sentences over five years except those imposed for political crimes.

Military courts are integrated with the civil judiciary and culminate at the top of the judicature in the Military Division of the Supreme Court. An appeal lies thence to the plenary session of the Supreme Court. The decisions of all military tribunals are subject to review by the Military Division, which also has an original jurisdiction in grave cases of treason, espionage and terrorism and in any case specifically assigned to it by the Presidium of the Supreme Soviet, e.g., the case of L. Beria in 1953. The military tribunals are, as has been stated, wholly independent of the mili-

through discipline the rights not only of superiors but also of subordinates. Of the many outstanding features of the Soviet of a court, by alleging the illegality of that decision, before a superior court. These military tribunals are composed of professional military judges with military rank, appointed by the Military Division of the Supreme Court. They sit with two officers drawn from the military units who act as assessors. These "assessor" officers do duty on a roster system and for that purpose are taken off all other duties. Military tribunals exist at division and above. Jurisdiction over service personnel is determined by the rank of the accused. The jurisdiction of these courts extends to all servicemen for all crimes and to all persons for certain counter-revolutionary crimes, to enemy prisoners of war, to civil defense personnel, and to officials of the Ministry of Internal Affairs and of the labor camp services. Their jurisdiction extends to civilians for theft of weapons, failure to mobilize and complicity in military crimes.

The procedure of these courts is inquisitorial. Hearings are conducted in public with confrontation of witnesses and representation of the accused. By Article 111 of the Soviet Constitution, it is provided that "in all courts of the U.S.S.R. the accused is guaranteed the right to defense." This has been interpreted as including the right to have counsel. Until 1956, this right was denied in trials for counter-revolutionary crimes and in all cases heard by military tribunals during the recent war. Military tribunals require proof of guilt and their decisions are subject to appeal. Until 1956, this procedure did not apply in counter-revolutionary crimes, which were tried in a highly arbitrary manner. By an edict published in April 1956, the procedure for the trial of these crimes has now been assimilated to that of ordinary crimes. Under the Soviet system, considerable emphasis is placed on the pretrial procedure in which the investigation is normally carried out by investigators of the Military Procuracy. It is at this early stage that the accused is at considerable disadvantage, and although in theory he has a number of rights, in practice they are generally denied. In fact, the pretrial procedure is really more important than the actual trial in public. This is a common feature of the continental criminal law system. Appeals from the military tribunals may and do go up to the full session or plenum of the Supreme Court, and may be "protested" (i.e., objected to as defective in law) by the procurator right up to the Presidium of the Supreme Soviet, but on the "protest" procedure the accused are not present.

The Procuracy has been described as the cornerstone of the Soviet legal system. The Procurator-General is appointed by the

Supreme Soviet for seven years. He appoints all his subordinates including the Military Procurators who are detailed to act at each command level where a military tribunal sits. The function conferred on the procurator by the Constitution is to "exercise supreme supervisory power to insure strict obedience of the law by all officials." In some ways, their functions are analogous to those of the French Conseil d'Etat. The three main duties of the Military Procurator are to investigate, to prosecute and to "protest" to the higher organs of the military judiciary. Upon this official the proper administration of military justice really depends. If he does his tasks conscientiously, justice can be done. In particular, he can restrain excesses and abuses of authority by senior military commanders. The period of "illegality" under Stalin and Beria was one in which the procurators were presented with completed investigations conducted with total disregard of law and justice by the agents of the MVD. The procurators were then required to bring the case to trial without any chance to "open up" the investigations. At all levels and particularly at the higher ones, personal relationships affect the delicate balance between commanders and procurators for a strong military commander may dictate to a military procurator and *vice versa.*

It is not without interest that in 1939 a military law school was established in the Soviet Union to train military judges, procurators and investigators. The course is four years in length and requires a training up to university law school standards. It is an accepted principle of the Soviet Army that "every officer of the Soviet Army and Navy needs to know the principles of legal institutions and of international law." The curriculum is detailed and includes the study of foreign military law—something of which we would be well advised to take note.

It must be admitted that our knowledge of the actual administration of Soviet military law must necessarily be fragmentary and imperfect. To a certain extent, the laws do reflect the practice. In part, the evidence comes from emigré officers who have served in the military procuracy or on the military tribunals. In the interests of military efficiency and discipline, it can be said with some justification that a considerable degree of military autonomy was seen to be necessary by the Soviet leaders. The system of military courts and the procuracy has to some extent established that autonomy in the legal order. It is clear that the officer status is still very important and that a military tradition going back to pre-revolutionary days has been fostered. The very strictness of the discipline established needs minute specification and definition of the rights of subordinates, for military justice establishes

tary command. Apart from the system of appeal, the Military Procuracy may "protest" any official act, including the decision military law system, we must include the important functions of the Zampolit. He acts as chaplain, propaganda officer, education officer, and is generally considered to be the cream of the Communist Party. Their reputation in combat stands very high. Attention must also be drawn to the special security (00) sections which function within the units but are not part of them and rely heavily upon secret informers. Their precise influence is difficult to gauge. At the same time, we must remember that the rigorous civilian life of the ordinary Soviet citizen accounts for the acceptance of a degree of severity in military law discipline which certainly would not be acceptable in the Western states. The Soviet leaders have certainly not been blind to the requirements of justice in military law, particularly in the trials of military crimes. Justice is an important element in the maintenance of discipline and hence in the maintenance of efficiency in the armed forces. A host of injustices done to the private soldier may foster large scale defections in line of war. The original Red Army of the revolutionary years was formed out of the deserters from the Imperial armies of Tsar Nicholas II. It was of these deserters that Lenin said quite accurately: "They voted for the Revolution with their feet."

For other distinctive features of Soviet military law, we have the permanent professional judiciary and procuracy neither of which are subject to the military command. The vital role of the procuracy also plays a part in making the Soviet system of military law unique. There is also the close interaction of security, Party and legal organs. Because of this interplay of forces, the Soviet offender against military law may find himself in trouble from four different sources at one time; viz., his commander, the Zampolit, the Security (00) Section, and the procuracy. Above all, the highly capricious nature of the Soviet system of law must be stressed. This does not lead, as some have suggested, to a considerable divergency between the law in the Code and the law in action. The law is deliberately framed so widely that an accused can always be enmeshed if required.

Against this factor must be countered the impartiality and regard for law that is manifest in the decisions of the Supreme Court whereby decisions of lower courts are reversed for error and injustice. As in the Soviet system as a whole, we see the endless vacillation between harshness and leniency, so in the realm of law we are confronted with highly arbitrary acts done in the name of "political justice," and at the same time with decisions of the Supreme Court in nonpolitical cases that show a scrupulous

concern for the doing of justice according to law. Under the essentially parental and educational role of the judiciary, the accused is seen as a bad child who must be punished in an "educational" manner. The Soviet theorists consider law as a factor of social order absolutely indispensable in a modern urban and industrial society. To them, the law is an agency by which to transform the people. Law is an instrument of social engineering. It is equally clear that the leaders of Soviet society are the masters of the law. In the realm of Soviet military law, the Soviet leadership has designed an ingenious system whereby they have contrived to preserve that exact discipline necessary for the efficiency of the fighting services without abandoning that minimum standard of justice which is essential to prevent defection. At the same time, they have managed to preserve the authority of the military and political leadership. This is no mean achievement.

In conclusion, it can be urged with confidence that the study of Soviet military law is an important function of The Judge Advocate General's Corps. Not only is it sound military policy to know your adversary well, but you will remember that under Article 82 of the Geneva Prisoners of War Convention of 1949 it is Soviet military law to which prisoners of war held in the custody of the Soviet Union will be subjected. Further, prisoners' representatives are entitled under Article 104 of that Convention to receive advance information of all trials of prisoners of war. Also judge advocate officers are entitled to assist fellow prisoners at their trials. Therefore, on these grounds alone we would be well advised to see to it that there are those in our armed forces who are well versed in Soviet military law. Indeed, you may think that the study of Soviet military law could find a place in the curriculum of The Judge Advocate General's School.

(*Note.* This article was prepared from a lecture delivered on 30 September 1958. On 25 December 1958, the Supreme Soviet of the U.S.S.R. enacted a number of important changes in the criminal law system of the Soviet Union. These changes took three main forms. First, military and state crimes are now Union or Federal matters and have been defined in new legislation of the Supreme Soviet. Second, a new statute on Military Tribunals and the Military Procuracy has been approved by the Supreme Soviet. Third, a number of general principles of criminal responsibility have been established and approved by the Supreme Soviet for the guidance of the constituent republics of the Union. All these changes will have a considerable bearing upon the matters discussed in the article and may render obsolete some of the matters discussed there. The full texts of the new legislation and the Statement of General Principles were published in *Izvestia* on 26 December 1958 but were not available in translation at the date of this note, namely, 6 January 1959. Thus, there is now a real need for a fresh exposition of the subject which will embrace these recent changes and assess their proper place in the system of Soviet military law.)

PRIVILEGED COMMUNICATIONS IN MILITARY LAW*

BY CAPTAIN THOMAS C. OLDHAM**

The primary goal of a judicial action is the ascertainment of truth. To the extent that a witness possessing information relevant to the inquiry is permitted to refuse to disclose that information, the search for truth is frustrated. Nevertheless, this obstacle to the just conclusion of litigation has been deemed not too great a price to pay for cloaking in secrecy certain fundamental human associations. In order to protect the confidential character of these important relationships, the participants are "privileged" to withhold their communications to each other from judicial scrutiny.

Dean Wigmore once formulated four conditions precedent to the establishment of a privilege against disclosure of communications which have since become the cornerstone of the development of this portion of the Law of Evidence:

> "(1) The communications must originate in a *confidence* that they will not be disclosed;
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* and
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."[1]

The initial and primary problem is, of course, whether the relation in which the communications originated is "one which in the opinion of the community ought to be sedulolusly fostered." Certainly the marital relation, freedom to worship, and the right to untrammeled legal representation are three of the sturdiest pillars of our democratic society. Our faith in their unalterable status is inviolable. In addition, the delicacy of the physician's consultation, treatment, and care has been deemed worthy of consideration in many jurisdictions. When coupled with the very real necessity for protecting governmental secrets, the circle of relationships justifying a privilege not to disclose is complete. Represented in this orbit

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[1] 8 Wigmore, Evidence §2285, at 531 (3d ed. 1940) (hereinafter cited as Wigmore).

are sociological, political, and psychological forces which command the respect and protection of the vast majority of the American populace.

Unfortunately, however, members of a number of trades and professions who enter confidential relationships with their clients have decided that preservation of their communications from disclosure in the courts would be of great benefit to the community. Accordingly, they have made strenuous attempts to erect a wall of evidential privilege around their confidential communications. These inroads into the effective and just administration of justice have intensified opposition to all the privileges and swelled the ranks of those who believe that the judicial search for truth outweighs any of the relationships protected by the confidential communication privileges.

In a case involving a claim by a factor of a privilege not to disclose the confidential communications of his principal, the United States Supreme Court aptly expressed the reason for the severe limitations which must be placed upon a privilege to conceal.

> "It would be of very dangerous consequence, if it was established, that a commercial agent was not amenable as a witness in a court of justice, in a cause against his constituent. It is straining the matter of privilege too far. And, if the law makes him a witness, we are too fond of getting at the truth, to permit him to excuse himself from declaring it, because he conceives, that, in point of delicacy, it would be a breach of confidence."[2]

It remains true that the overriding necessity for full and complete disclosure of relevant facts by a testifying party will not be curtailed by the mere existence of a confidential relationship. Only those relations which have received the full approval of the courts, predicated upon the general demands of the public, are accorded exemption.

Military law has long acknowledged that communications arising from certain confidential relations require protection for reasons of public policy.[3] The early rules of evidence which were established in this respect have been continued through the years without material change other than the addition or deletion of qualifying language concerning a particular relationship.[4] The only major development—that extending the rules to embrace communications

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[2] Holmes v. Comegys, 1 U.S. (1 Dall.) 439 (1789).

[3] Winthrop, Military Law and Precedents 330–332, 335 (2d ed. 1920 reprint). Colonel Winthrop includes the following: state and police secrets, attorney and client, and husband and wife (the latter, however, considered as part of the testimonial privilege). He also states that communications to clergymen and physicians, being unknown to the common law and not subject to Federal statutes, are not privileged.

[4] See pars. 227, 229–232, MCM, 1917; pars. 227, 230, MCM, 1921; par. 123, MCM, 1928; par. 137, MCM, 1949.

made to clergymen—is of fairly recent origin[5] and has seen little practical application in courts-martial.

The *Manual for Courts-Martial, United States, 1951,* defines the concept of privileged communications and emphasizes its importance in clear terms:

> "A privileged communication is a communication made as an incident of a confidential relation which it is the public policy to protect. Since public policy is involved, the court, *of its own motion,* should refuse to receive evidence of such a communication unless it appears that the privilege has been waived by the person or government entitled to the benefit of it, or unless the evidence emanates from a person or source not bound by the privilege."[6]

The present military law[7] places the shield of privilege over certain communications derived from sources which may be categorized as personal and governmental. The personal privileges apply to communications between attorney and client, husband and wife, and penitent and clergyman. The governmental or executive privileges embrace the deliberations of courts and juries, diplomatic correspondence, official communications (disclosure of which would be detrimental to the public interest), communications of informants to public officers engaged in the discovery of crime, and investigations of Inspectors General and their assistants. Privileges are not recognized for communications made by wire or radio or those made to medical officers and civilian physicians.[8] All of the privileged relationships acknowledged in military jurisprudence are accorded the same status in Federal law, albeit in varying degrees.

The problems common to all privileges are met both in civilian and military trials. In general, the same evidentiary principles apply in both forums. However, many of the rules which have evolved in the law relate principally to civil rather than criminal proceedings and therefore are not entirely adaptable to courts-martial. In some instances, the fundamental differences between a military and a civilian society are manifested in conflicting standards. To appreciate the underlying reasons for these variations, it is necessary that the relationships be examined separately.

I. ATTORNEY AND CLIENT

The attorney-client privilege is the oldest of the common-law exemptions for confidential communications and has been firmly embedded in military law by the Court of Military Appeals, which

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[5] Par. 137, MCM, 1949.
[6] Par. 151*a*, MCM, 1951 (emphasis added).
[7] Par. 151*b*, MCM, 1951.
[8] Par. 151*c*, MCM, 1951.

recently declared that "once the attorney-client relationship has been shown to exist, no court—either Federal or state—has been more zealous in safeguarding and strengthening the privilege arising therefrom than has this Court."[9]

In *United States* v. *Marrelli*,[10] the late Judge Brosman explained that the privilege "exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him." Preservation of this confidential relation between client and attorney is "essential to the rendition of legal services—for without knowledge of the facts a lawyer cannot properly perform his role in representing his client and in effecting a satisfactory disposition of disputes and difficulties."[11] It was also pointed out in *United States* v. *Fair*[12] that there is even more justification in the military than in the civil sphere to encourage a complete disclosure to the attorney by a serviceman who is accused of a crime. This is so because of the natural reluctance on the part of an enlisted man to divulge the details of possible wrongdoing to a superior officer.

The duty to preserve a client's confidences which is demanded of a lawyer finds formal expression in Canon 37 of the American Bar Association *Canons of Professional Ethics*,[13] and the responsibilities in this regard of military counsel are recited in paragraph 48 of the Manual for Courts-Martial.[14] The required standards

[9] U.S. v. Turley, 8 USCMA 262, 265, 24 CMR 72, 75 (1957). See 8 Wigmore §2290 for a treatment of the history of the privilege. Briefly, the privilege dates dack to the 16th century and originally was in consideration of the oath and honor of the attorney rather than for the protection of the client. The privilege was limited to communications received since the beginning of the litigation at bar and for its purposes only. It was not until the end of the 18th century that the privilege was predicated upon inducing consultation between attorney and client free from fear of disclosure. The new concept gradually extended the exemption to include communications made during any other litigation, in contemplation of litigation, during a controversy but not yet looking to litigation, and finally in any consultation for legal advice irrespective of litigation or even controversy.

[10] 4 USCMA 276, 15 CMR 276 (1954).

[11] *Id.* at 281, 15 CMR 281.

[12] 2 USCMA 521, 10 CMR 19 (1953).

[13] Canon 37 states in part: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. . . ."

[14] Par. 48*c*, MCM, 1951, provides in part: ". . . . He will guard the interests of the accused by all honorable and legitimate means known to the law . . . and not . . . divulge his secrets or confidences. . . ."

of professional conduct contained in these sources provide a basis for the privilege under military law.

The Manual for Courts-Martial couches the broad requirements for the establishment of the privilege in the following language:

> "Among the communications to which a privilege attaches are certain communications between . . . client and attorney. . . . Communications between a client and his attorney (or the agent of the attorney) are privileged when made while the relation of client and attorney existed and in connection with the matter for which the attorney was engaged, unless such communications clearly contemplate the commission of a crime—for instance, perjury or subornation of perjury. Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege. . . ."[15]

In the interpretation and application of the foregoing provisions, the Court of Military Appeals has frequently referred to another of Dean Wigmore's celebrated legal formulas:

> *"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection my be waived."*[16]

With certain modifications, Wigmore's eight prerequisites can be of practicable use in determining the existence of the privilege, particularly in cases involving civilian counsel. The term "professional legal adviser" in his second requirement must be construed broadly since counsel in trials by special courts-martial are not ordinarily lawyers. His fifth requirement seems inappropriate because military law extends the privilege to communications of both client and attorney.

A. *The Relationship*

Since the communications protected are only those made while the relation of attorney and client exists,[17] the principles governing the creation and duration of the relationship are important. In this vein, it has been held that a mere casual conversation with an attorney, even though legal advice may be given at the time, does not create the relationship.[18] But it is formed when legal advice is obtained from a legal assistance officer[19] even though

[15] Par. 151*b*(2), MCM, 1951.
[16] 8 Wigmore §2292, at 558.
[17] CM 192530, Browne, 1 BR 383, 398 (1930).
[18] CM 324725, Blakeley, 73 BR 307, 321 (1943).
[19] U.S. v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955). In McCluskey, the Court referred to Army legal assistance regulations and acknowledged the "commendable effort" to elevate the standards of professional service afforded military personnel. *Accord*, ACM 9225, Brownell, 17 CMR 741 (1954); ACM 13217, Kellum, 23 CMR 882 (1957).

such action is in contravention of regulations prohibiting the giving of legal advice in connection with a pending or potential court-martial.[20] In this situation, the Court of Military Appeals said: ". . . . Suffice it to say that if, by operation of law, an attorney-client relationship was, in truth, formulated, such Regulations cannot operate to nullify it."[21]

It also has been held that the relationship exists where a commander who is the appointed assistant defense counsel of an existing court-martial investigates charges in his capacity as commander against an accused member of his unit, even though he does not participate as counsel at the trial.[22]

There is more to creating the relationship than the mere publication of an order which appoints counsel.[23] For instance, although the representation of an accused at a pretrial investigation is enveloped by the privilege,[24] he has the right to counsel of his own choice and it is necessary that he consent to representation by appointed counsel.[25] Accordingly, in a case where military counsel was appointed to represent an absent accused without his knowledge at the taking of a deposition and it later appeared that the accused had hired civilian counsel for his defense, the relation of attorney and client between military counsel and accused was not created.[26] The relationship was also not formed where, over the objection of defense counsel, officers were appointed to represent both sides in the taking of depositions about 350 miles from the place of trial, and the accused neither saw nor consulted with the officer representing him.[27]

Even though no attorney-client relation was found in the above cases in which the accused complained of the unauthorized representation, the relationship would undoubtedly have been held to be established for the limited purpose of protecting any confidential information imparted to the attorney by the accused.

A related question has been the subject of Federal decisions relative to the employment of civilian counsel. It has been held that communications made in good faith to an attorney for the purpose of obtaining his professional advice or assistance are privileged even though the attorney may decline employment and is paid

[20] Par. 10*a*, AR 600–103, 29 Jun 1951.
[21] U.S. v. McCluskey, 6 USCMA 545, 551, 20 CMR 261, 267 (1955).
[22] CM 331574, Lloren, 80 BR 61, 65 (1948).
[23] U.S. v. Miller, 7 USCMA 23, 21 CMR 149 (1956).
[24] U.S. v. Green, 5 USCMA 610, 18 CMR 234 (1955).
[25] U.S. v. Nichols, 8 USCMA 119, 23 CMR 343 (1957); U.S. v. Goodson, 1 USCMA 298, 3 CMR 32 (1952).
[26] U.S. v. Miller, 7 USCMA 23, 21 CMR 149 (1956).
[27] U.S. v. Brady, 8 USCMA 456, 24 CMR 266 (1957).

no fee.[28] In such cases, the reasoning seems to be that the attorney by listening to the problems of the person seeking advice has impliedly consented to represent him.[29] This view has been noted favorably in a military decision,[30] and justly so, since confidential communications preliminary to actul retainer or engagement are often necessary. They should be unconstrained and without apprehension of disclosure. The test of whether or not the relation exists in such cases is determined by the intent of the parties at the time of contact.[31]

Another refinement in the Federal courts is that communications voluntarily made to a co-defendant's attorney whom the defendant never intends to employ as his representative are not privileged in the absence of a joint defense.[32] This principle has been the subject of a military opinion in a case involving the preparation of post-trial clemency reports on several accused by counsel who represented a co-accused at the pretrial investigation.[33] An Air Force Board of Review there stated that merely because an attorney represents one of several co-accused, he does not automatically or by operation of law become the attorney for all. However, the board warned that the facts must show an absence of an attorney-client relationship, and, if not, appearances must be construed against the attorney and in favor of the client. If it appears that the attorney has entered into what may be deemed a common defense for all accused, he will be presumed to have entered into the relationship with respect to all and to be privy to their secrets.

Is an attorney-client relation formed between the accused and the lawyer who conducts the post-trial interview? An Army Board of Review has held that the relationship between the two parties is "quasi-confidential" in nature, and only in the most unusual circumstances should the statements of an accused be used against him at a subsequent trial. The board reasoned that since the purpose of the review is to obtain background information for the reviewing and clemency authorities, the accused must feel free to make a full disclosure of the facts. This holding amounts to a policy decision and falls short of finding the existence of a true attorney-client relationship. On petition, the Court of Military Appeals assumed error in the disclosure by the interviewing officer of the confidences of the accused at a subsequent trial but found no

[28] Lew Moy v. U.S., 237 Fed. 50 (8th Cir. 1916).
[29] Smale v. U.S., 3 F.2d 101 (7th Cir. 1924).
[30] ACM 10608, Brown, 20 CMR 823 (1955).
[31] *Ibid.*
[32] Smale v. U.S., 3 F.2d 101 (7th Cir. 1924).
[33] ACM 10608, Brown, 20 CMR 823 (1955).

prejudice and declined to decide whether the statements were privileged communications.[34]

B. *Duration of Privilege*

Troublesome questions arise in determining when the privilege ends. Early Supreme Court decisions declared that the protection of the law to communications made during the attorney-client relationship is perpetual[35] and does not end with the termination of the litigation or even the death of the client.[36]

The question of duration of the privilege was considered in *Bryant*.[37] There, the appointed defense counsel was not present at the court-martial, having been expressly excused. After trial, however, he interviewed the accused and prepared the post-trial clemency interview which was incorporated into the review of the Staff Judge Advocate of a higher headquarters. The board of review, in holding that such inconsistent representation was violative of the privilege, stated:

> "The termination of the attorney-client relationship does not terminate the attorney's obligation to the client to preserve the privilege implicit in the confidential communications and to abstain from taking any part in the proceedings contrary to the client's interest. The privilege in pertinent respects might well be classified as eternal because it is, with certain exceptions not applicable here, not limited to the duration of the litigation. . . ."[38]

In *United States* v. *Fair*,[39] the defense counsel's attempt to question a former client, who had been granted immunity to testify against the accused, regarding confidential communications made during their attorney-client relationship was prohibited on the ground of privilege. The Court of Military Appeals upheld the assertion of privilege regardless of the intervening grant of immunity.

C. *Extent of the Privilege*

What communications are covered by the privilege? Does it extend to everything that is said and done between the parties while the relationship exists? Paragraph 151*b*(2) of the Manual sets forth the scope of the privilege in general terms only. It provides that communications between client and attorney, or the latter's agent, are privileged when made while the relation existed and in connection with the matter for which the attorney was

[34] U.S. v. Fleming, 3 USCMA 461, 13 CMR 17 (1953).
[35] Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); Popovitch v. Kasperlik, 70 F. Supp. 376 (W.D. Pa. 1947).
[36] Glover v. Patten, 165 U.S. 394 (1897).
[37] ACM 8270, 16 CMR 747 (1954).
[38] *Id.* at 751.
[39] 2 USCMA 521, 10 CMR 19 (1953).

engaged, unless such communications clearly contemplate the commission of a crime. This provision reasonably may be construed to include the Federal rules contained in the following paragraphs, when appropriate.

The general rule in civilian jurisdictions is that the privilege extends to all communications made to a duly qualified and employed legal adviser who is acting in that capacity where the object of the communicating party is to obtain a more exact and complete knowledge of the law affecting his rights, obligations, or duties relative to the subject matter to which the communication relates.[40] Although this basic proposition may be carried over into the military, it must be extended somewhat to provide protection to communications made by the lawyer as well as the client.

It has long been acknowledged that the question of whether an attorney has in fact been employed does not involve a breach of professional confidence since it is preliminary in nature and establishes merely the existence of the relationship.[41] Counsel also may be compelled to disclose the name and residence of his client.[42] Although the fact that a retainer was paid is not privileged information, the actual terms of the retainer are confidential.[43]

It is clear that in Federal civil jurisdictions the privilege does not extend to every statement made to the attorney by the client. If the particular statement concerns matters unconnected with the business at hand, or is one made in a general conversation, or is made merely as a personal friend, it is without the scope of the privilege.[44]

The privilege does not entitle the attorney to refuse to identify documents he has witnessed[45] or to decline to testify with reference to facts which were obtained from third parties[46] or were otherwise not communicated to him by the client, even though he may have become acquainted with such facts while engaged in

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[40] Alexander v. U.S., 138 U.S. 353 (1891).

[41] Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1948); Goddard v. U.S., 131 F.2d 220 (5th Cir. 1942).

[42] U.S. v. Lee, 107 Fed. 702 (E.D.N.Y. 1901).

[43] Magida v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951).

[44] Modern Woodmen of America v. Watkins, 132 F.2d 352 (5th Cir. 1942). In a suit on a life insurance policy where the suicide of the insured was in issue, the statement of the deceased reflecting his suicidal state of mind made to an attorney while attempting to borrow money from the latter in his capacity as manager of a small loan company was admissible.

[45] Clark v. U.S., 245 Fed. 112 (9th Cir. 1917); *In re* Ruos, 159 Fed. 252 (E.D. Pa. 1908).

[46] *Ibid.* See also Randolph v. Quidnick Co., 23 Fed. 278 (C.C.D.R.I. 1885).

professional duty for the client.[47] Accordingly, an attorney is bound to produce letters communicated to him from collateral quarters and to testify regarding matters of fact as distinguished from matters communicated to him by the client in professional confidence.[48]

A confidential communication is usually an oral or written statement as distinguished from an act. However, almost any act done by the client in the sight of the attorney during the consultation *may* be the subject of a communication. The only question will be whether, under the circumstances, it was intended as such.[49] For instance, facts obvious to any observer, such as the general physical condition and actions of an individual, independent of communications relating to confidential legal advice, are not privileged.[50] The client, however, may make a specimen of his handwriting for the attorney's information, exhibit an identifying scar, or show a secret object. If any of these acts are done as part of a confidential communication to the attorney, the privilege may exist.[51] Each case must be considered under its own peculiar facts and circumstances in ascertaining the existence of an intent to communicate.

In *United States* v. *Marrelli*,[52] the full scope of the privilege was brought into sharp focus. That case involved charges of larceny by check in obtaining goods from merchants. After dishonor of the checks and their return to the payee merchants, a civilian attorney retained by the accused or his mother paid and obtained the checks, apparently in an effort to forestall criminal proceedings against the accused in the state courts. Thereafter, the accused's commanding officer requested and received from the attorney temporary possession of the checks in order to have them photostated. At the trial, when the photostats of the checks were placed into evidence by the prosecution, the defense counsel objected vigorously to their admission on the ground that they had been improperly obtained in violation of the attorney-client privilege. The civilian attorney did not appear as a witness or as counsel for the accused during the court-martial.

Judge Brosman, speaking for the court, initially noted that the lawyer-client privilege must be confined to its narrowest limits[53]

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[47] General Electric Co. v. Jonathan Clark & Sons Co., 108 Fed. 170 (W.D.N.Y. 1901); ACM S–9666, Thomas, 18 CMR 610 (1954).
[48] *Ibid.*
[49] 8 Wigmore §2306.
[50] Willard C. Beach Air Brush Co. v. General Motors Corp., 118 F. Supp. 242 (N.J. 1953).
[51] 8 Wigmore §2306.
[52] 4 USCMA 276, 15 CMR 276 (1954).
[53] Citing Prichard v. U.S., 181 F.2d 326 (6th Cir. 1950).

so that the exclusion of relevant evidence will not exceed in scope the policy it is designed to serve. In determining whether the privilege existed, the case was examined in the light of Wigmore's eight-point criteria.[54] The court observed that the checks could not qualify as communications related to the purpose of securing legal advice or services from an attorney because the representations or communications were in no way directed to the lawyer. In addition, his services had not even been retained at that time. Since the utterances antedated the establishment of any attorney-client relation, the checks acquired by the lawyer were not considered to fall within the scope of the privilege.

The court also found that the requisite element of confidentiality[55] was not present because delivery of a check to a payee permits negotiations through the hands of numerous indorsers. Since the checks had passed out of the control of the accused when uttered, they came to the attorney from outside sources totally unrelated to his client and could not constitute a communication from him.

In finally determining that the privilege was not infringed, it was pointed out that the function of the attorney in securing the checks was ministerial in character, demanded neither legal training nor ability, and that a non-lawyer could have served the accused's purpose fully as well as a lawyer. In this connection, the court compared the case with the line of Federal decisions which deny the protection of the privilege where the lawyer's connection with certain information is entirely disassociated from his capacity as an attorney and independent of his services as such. So, if a lawyer undertakes to translate his activities into those of an accountant in the maintenance of bank accounts, or if he receives communications relating to other routine business transactions which are non-legal in nature, such activities do not come within the spirit or purpose of the privilege.[56]

The exception to the privilege regarding communications which contemplate the commission of a crime was also mentioned in the *Marrelli* decision. The court remarked that the strict interpretation of the privilege served to explain the rule that an attorney may be compelled to testify concerning a client confidence received in connection with a projected crime. The social interest favoring full disclosure by clients to attorneys does not shield confidences made for the purpose of seeking legal advice as to how best to commit a contemplated offense.

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[54] See note 16 *supra*.
[55] See section IV *infra*.
[56] U.S. v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952).

It must be remembered that for such communications to fall outside the privilege they must be made in *contemplation* of the commission of a crime. The privilege ceases only for advice as to future wrongdoing as contrasted with past acts. This relaxation of the privilege seems to be in furtherance of maintaining a higher standard of professional ethics by preventing the relation of attorney and client from operating as a cloak for wrongdoing and thereby depriving it of the public trust which alone justifies the privilege.

The rule concerning contemplated crimes originally appeared to apply only in cases where the privilege was asserted at the trial of the party for the particular crime itself.[57] However, later cases have held that such a communication is not privileged in any judicial proceeding.[58]

In consonance with this general principle, it has been held that an attorney may testify for the purpose of identifying his client as a person who, in the former's office, forged a signature on a document later used in committing a crime.[59] Similarly, a defendant's action in depositing money with his attorney in order to evade income tax laws was held to be in furtherance of his crime and not privileged.[60]

Although the privilege disappears if it is invoked to cloak a conspiracy between the attorney and client to violate the law,[61] or to concoct and perpetrate a fraud,[62] the mere assertion at the trial of an intended crime or fraud is not enough to release the attorney from the prohibition against divulging privileged communications, and it is necessary that first a prima facie case of the alleged crime be established.[63]

D. *Representing Conflicting Interests*

The prohibitions in the Uniform Code,[64] Manual,[65] and *Canons of Professional Ethics*[66] against the representation of conflicting

[57] Alexander v. U.S., 138 U.S. 353 (1891).
[58] *In re* Sawyer, 229 F.2d 805 (7th Cir. 1956).
[59] Fuston v. U.S., 22 F.2d 66 (9th Cir. 1927).
[60] Pollock v. U.S., 202 F.2d 281 (5th Cir. 1953).
[61] U.S. v. Olmstead, 7 F.2d 760 (W.D. Wash. 1925).
[62] A. B. Dick Co. v. Marr, 95 F. Supp. 83 (S.D.N.Y. 1950).
[63] U.S. v. Bob, 106 F.2d 37 (2d Cir. 1939).
[64] Art. 27, UCMJ (10 U.S.C. 827 (1952 ed., Supp. V)). The statute reads in part: ". . . . No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution."
[65] Pars. 6*a*, 44*b*, 45*a*, 46*b*, 47, 48*c*, 61*f*(4), MCM, 1951.
[66] Canon 6, ABA.

interests are in some respects related to the law of privileged attorney-client communications. One reason that a former attorney for an accused may not subsequently take part in his prosecution is that the attorney has received confidential admissions which he will employ, consciously or subconsciously, against his former client.[67] However, this article is concerned solely with the rule of privilege which allows attorney-client communications to be excluded from evidence and will not consider the rules regarding conflicting representation.

E. *Present Status of Privilege*

As in the case with the other privileges, courts are taking an increasingly careful look at each claim of attorney-client privilege to insure that only those confidences essential to the relation are allowed to remain secret at the expense of full discovery of the truth. As stated by Judge Irving R. Kaufman in construing the New York statutory privilege:

> ". . . . As much as any privilege, it has been buffeted around our courts in recent years. There is nothing sacrosanct about it. It is a product of legislation, without Constitutional guarantee, and it is far from inviolate. Basically, it is an expression of policy, sacrificing full disclosure for the considered advantage of untrammeled attorney-client relations. It is not a boundless right, and its limits constantly shift. . . .
>
> The privileged status of attorney-to-client communications has been debilitated by the inroads of liberal discovery doctrines. The scope of the privilege contracts as the need for discovery grow. . . ."[68]

However, Court of Military Appeals decisions in dual representation cases "presuming" disclosure or use of confidential communications by an attorney against a former client indicate that the military appellate courts will vigorously protect the confidential nature of attorney-client consultations.[69]

II. HUSBAND AND WIFE

> ". . . . Confidential communications between husband and wife, made while they were husband and wife and not living in separation under a judicial decree, are privileged. . . ."[70]

Although the common law had long protected a married litigant from betrayal by prohibiting the offering of adverse testimony by his spouse, it was not until the mid-nineteenth century that a separate privilege to prevent disclosure of intra-marital com-

[67] U.S. v. Green, 5 USCMA 610, 613, 18 CMR 234, 237 (1955).
[68] Magida v. Continental Can Co., 12 F.R.D. 74, 76-77 (S.D.N.Y. 1951).
[69] U.S. v. Green, 5 USCMA 610, 614, 18 CMR 234, 238 (1955).
[70] Par. 151*b*(2), MCM, 1951.

munications evolved.[71] Although the two are separate and distinct, considerable confusion has been engendered by failure to distinguish between competency and testimonial privilege on the one hand and the privilege with regard to marital communications on the other.[72]

The communications privilege protects marital confidences from disclosure in *any* judicial action regardless of whether one of the spouses is a party thereto. The privilege exists solely to promote and encourage mutual confidence between husband and wife. This is considered so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.[73] Military law has long recognized the privileged character of confidential communications between husband and wife[74] and the basic provisions of the privilege have been carried over into the present rules of evidence.

A. *Existence of the Relationship*

It is necessary that the communications be made during the existence of a valid marriage in order to acquire immunity.[75] In military law, as in civilian, the validity of a marriage is determined by the law of the place where contracted.[76] If it is valid there, it

[71] 8 Wigmore §2333. Dean Wigmore points out that few cases posed problems which were not also covered by the privilege of a party spouse to exclude adverse testimony by the other spouse. The only situation which was not thereby disposed of was that in which a husband was not a party to the action but his communication to his wife was material and offered to be proved by her. This situation was rare in view of the then existing disabilities of married women.

[72] ". . . . That the two are distinct is plain; for the privilege not to testify against the other is broader in the respect that it excludes testimony to any adverse facts even though they have been learned wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony adverse in its tenor and adverse to a party to the cause or to one in an equivalent position. . . ." 8 Wigmore §2333, at 637. Another difference is that the testimonial privilege may cease with the death or divorce of the spouse against whom the testimony may be offered while the privilege for confidential communication is perpetual. 8 Wigmore §§2334, 2341.

[73] Wolfle v. U.S., 291 U.S. 7 (1934). According to American Jurisprudence, "the law considers that a man must be able to impart to his wife, and a woman to her husband, the most critical conditions of his or her affairs, in the full assurance that no process of law can compel a violation of confidence. . . ." 58 Am. Jur., Witnesses, §375. As a practical matter, it is doubtful that many married couples are aware of their privilege against disclosure of confidential communications.

[74] Par. 227, MCM, 1917; par. 227, MCM, 1921; par. 123*b*, MCM, 1928; par. 137*b*, MCM, 1949; Legal and Legislative Basis, Manual for Courts-Martial, 1951, p. 239.

[75] U.S. v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

[76] U.S. v. Richardson, 1 USCMA 558, 4 CMR 150 (1952).

is valid everywhere. If, however, the marriage is invalid where contracted, the relationship of the parties to it is not legally that of husband and wife.[77]

The privilege, of course, does not apply to communications made prior to marriage,[78] and, therefore, letters written by a wife to her husband before they were married[79] or information acquired by a wife concerning her husband's financial affairs before marriage[80] are not confidential communications.

The Manual provision protects communications made while the husband and wife are separated but "not living in separation under a judicial decree." The comparable civilian rule seems to deny the privilege to communications made during mere *de facto* separation.[81] The more liberal military view is designed to cover those frequent situations where the parties are living apart due to the requirements of the service. Even if the separation is by mutual consent, not the result of a judicial decree, the parties may avail themselves of the privilege in courts-martial. This seems justified since the marriage relationship should be fostered as long as there is hope for reconciliation and until the parties are separated by legal action.

In direct contrast to the testimonial privilege of the parties, the privilege for confidential communications is not terminated by divorce[82] or death. In *New York Life Insurance Company* v. *Ross*,[83] an action by a wife on an insurance policy, a Federal court refused to require production of a letter written by the deceased husband to the wife which was found with his will after death, holding that the privilege continues even after the marital status is terminated by the death of the spouse. This seems to be an unwarranted extension of the privilege. When the relationship to be protected is dissolved, the privilege should also terminate.

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[77] CM 17521, Bell, 32 BR (ETO) 209, 212 (1945).

[78] Pereira v. U.S., 347 U.S. 1 (1954).

[79] Halback v. Hill, 261 Fed. 1007 (D.C. Cir. 1919).

[80] Dobbins v. U.S., 157 F.2d 257 (D.C. Cir. 1946).

[81] Legal and Legislative Basis, Manual for Courts-Martial, 1951, p. 239, indicates that the judicial separation requirement is derived from 8 Wigmore §2335. That section, however, refers only to "separation" and states at page 640: ". . . . [T]he application of the privilege to a communication made between husband and wife *living in separation* . . . cannot be conceded; for here the policy of the privilege does not apply . . . since the relation is not one in which the law need seek to foster confidence, and no privilege ever came into existence." See Holyoke v. Holyoke's Estate, 110 Me. 469, 87 Atl. 40 (1913).

[82] Pereira v. U.S., 347 U.S. 1 (1954).

[83] 30 F.2d 80 (6th Cir. 1928).

B. *Extent of the Privilege*

Since the privilege frequently operates to suppress material and relevant testimony, it should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved.[84] To be privileged, there must be confidential disclosures or communications, the publication of which would betray conjugal confidence and trust or tend to produce family discord.[85] For example, letters between husband and wife relating to personal, family, and confidential matters are embraced within the rule.[86]

An interesting case illustrating the lengths to which the courts go to find confidentiality and thereby protect the relationship is *Blau* v. *United States*.[87] There, contempt proceedings were instituted against the defendant for his refusal to answer questions before a Federal grand jury and later before a district court as to the whereabouts of his wife. The defendant had been questioned in connection with an investigation of the activities and records of the Communist Party in Colorado. His wife also was being sought as a witness in the investigation. Upon conviction for contempt, the defendant appealed to the United States Supreme Court. In reversing the conviction, the Court said that the facts were undisputed that the defendant had learned of his wife's whereabouts by a communication from her, and that such a communication was "presumptively" confidential. It was of a kind likely to be confidential since the wife knew that she and others were wanted as witnesses but had hidden herself to avoid service of process. Under such circumstances, it seemed highly probable that the wife secretly told the husband where she could be found. The Court gallantly concluded that the defendant's refusal to betray his wife's trust was both understandable and lawful.

It was recently held that the privilege did not attach to business records of a husband which were turned over to an agent of the Internal Revenue Service by the wife for use in a tax evasion prosecution.[88] The decision was based on the fact that the documents were neither confidential nor did they constitute communications between the parties.

The privilege generally extends only to oral or written utterances and not to acts. Wigmore says that the mere doing of an act by the husband in the wife's presence is not a communication

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[84] Wolfle v. U.S., 291 U.S. 7 (1934).
[85] New York Life Ins. Co. v. Mason, 272 Fed. 28 (9th Cir. 1921).
[86] New York Life Ins. Co. v. Ross, 30 F.2d 80 (6th Cir. 1928).
[87] 340 U.S. 332 (1951).
[88] U.S. v. Ashby, 245 F.2d 684 (5th Cir. 1957).

since the act is done for the sake of the doing and not for the sake of the disclosure.[89] For an act to be covered by the privilege, he feels that there must be something in the way of an invitation of the wife's attention with the object of bringing the act directly to her knowledge. An example of the manner in which an act may become a part of the communication is where the husband brings a package into the home and orally directs the wife's attention to his act of placing it on a closet shelf. In this way, the act, of necessity, becomes privileged since to compel disclosure of the act would necessarily require disclosure of the oral communication.

In keeping with the general rule that only utterances are covered by the privilege, it has been held that testimony as to trips taken with others,[90] the fact that a telephone conversation was made,[91] or that a husband took money from his wife (earned in prostitution)[92] do not qualify as privileged matters.

C. *Actions for Injury to Spouse*

A curious anomaly in military law is that, in contra-distinction to the testimonial privilege between husband and wife,[93] confidential communications are not admissible in a court-martial even in a case where one spouse is being prosecuted for an offense injurious to the other.[94] There do not appear to be any particularly valid grounds for extending the privilege to such an extreme position. It is probably due to a natural hesitation to carve out any exceptions to the privilege which might open the door to further attacks on the marital institution. The fact remains that when an offense is committed by one spouse against the other or in derogation of the marriage, the need for protecting the relationship no longer exists. By the act itself, the offending party has shown his indifference toward preservation of the status. Although there has been some conflict in civilian courts on this point, the present trend is to nullify the privilege in such instances by invoking other applicable rules or by a determination that the requisite element of confidentiality is absent. In addition, the American Law Institute's *Model Code of Evidence* provides for an exception to the privilege in this respect,[95] showing a realistic and practicable approach to the problem which could well be emulated in military law.

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[89] 8 Wigmore §2337.
[90] Pereira v. U.S., 347 U.S. 1 (1954).
[91] Tabbah v. U.S., 217 F.2d 528 (5th Cir. 1954).
[92] U.S. v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).
[93] Par. 148*e*, MCM, 1951.
[94] CM 325636, Devine, 74 BR 387, 399 (1947).
[95] Model Code of Evidence rule 216 (1942).

D. *Exception in Favor of Accused Spouse*

In cases where an accused spouse requests disclosure of a confidential marital communication against the will of the testifying spouse, the Manual provides:

> "The privilege pertaining to confidential communications between husband and wife will not prevent the court from allowing or requiring such a communication to be disclosed at the request of a spouse who is an accused, even though he or she is the person to whom the communication was made and the spouse who made it objects to its disclosure."[96]

This provision was obtained from Wigmore's treatise on evidence[97] and was apparently incorporated into military law for the purpose of surrounding the accused with another of his many safeguards. Wigmore bases the exception upon the fact that in many cases involving a charge of crime brought against a spouse marital communications may become a key factor and, therefore, where one spouse needs the evidence of communications by either to the other in a trial involving a controversy between them, the privilege should cease or an injustice may be done. The framers of the Manual were of the opinion that although the cases arising under the exception often involve a controversy between the spouses, such fact is not a reason why it should be a necessary element of the exception.

Although the exception is a step in the right direction, it works only to the advantage of the accused. It would seem in cases involving controversies between the spouses that a more proper rule would be to entitle both sides to disclosure of the communication from the witness spouse in the interests of fairness and since the marriage relationship has usually been shattered anyway by the commission of the offense. The net result would be the virtual nullification of the marital privilege in such cases, as recommended above.

III. PENITENT AND CLERGYMAN

> ". . . . Also privileged are communications between a person subject to military law and a chaplain, priest, or clergyman of any denomination made in the relationship of penitent and chaplain, priest, or clergyman, either as a formal act of religion or concerning a matter of conscience. . . ."[98]

The penitent-clergyman privilege was a natural outgrowth of the old "judge-made" privileges for communications between attorney and client and husband and wife. Although not recognized at

[96] Par. 151*b*(2), MCM, 1951.
[97] Legal and Legislative Basis, Manual for Courts-Martial, 1951, p. 239; 8 Wigmore §2338(4).
[98] Par. 151*b*(2), MCM, 1951.

common law,[99] the privilege has been sanctioned in the majority of states by statute. They provide generally that a minister of the gospel or priest of any denomination may not be compelled to testify concerning communications made to him in his professional character, in the course of discipline enjoined by the rules of practice of his denomination.[100] Even in those jurisdictions where no privilege exists, most judges are understandably reluctant to compel the disclosure of such intimate communications.

It is manifest that the penitential relation deserves recognition and support in view of our nation's constitutional guarantee of freedom of religion. In addition, most persons in this country belong to a religious denomination which practices a confessional system of some nature. Wigmore concedes that this privilege has adequate grounds for recognition since a permanent secrecy is essential to any true confessional system.[101] However, he feels that if secrecy is not in the discipline of a particular church, the privilege should not apply.

It seems clear that the injury to the relation by compulsory disclosure would be greater than the benefit to justice. In addition, it would appear to be unconscionable for a prosecutor, in proving an offense, to rely on statements of a penitential nature made in good faith to clergymen.

The privilege was not accepted in military law until recently[102] and was first restricted to communications made to Army chaplains by persons subject to military law. Paragraph 151*b*(2) of the 1951 Manual, quoted above, extended the privilege to include communications made to *any* clergyman.

Although the privilege exists, it is rarely invoked at trial. There is no military case involving exercise of the privilege during a court-martial and in only two cases have military appellate tribunals had occasion to refer to the exemption at all.[103] There is an equal void in Federal law where only two cases, dealing with other privileges, have been found which even recognize the existence of the protected status accorded communications between penitent and clergyman.[104] It is thus necessary to unearth the

[99] 8 Wigmore §2394.

[100] 58 Am. Jur., Witnesses, §531.

[101] 8 Wigmore §2396.

[102] Par. 137*b*, MCM, 1949.

[103] ACM 10532, Kidd, 20 CMR 713 (1955); ACM 675, Ambabo (BR), 2 CMR (AF) 646.

[104] Totten v. U.S., 92 U.S. 105 (1876); U.S. v. Keeney, 111 F. Supp. 233 (D.C. 1953).

principles which have been established in connection with the privilege from the decisions of the various states.

A. *Existence of the Relationship*

Since the Manual provision embraces only those persons subject to military law, it appears that the privilege technically would be unavailing to a civilian witness or his clergyman even in a jurisdiction which recognizes the privilege by statute. It is difficult to perceive the logic behind this limitation. Even though the situations in which the problem might arise concededly are remote, consistency and uniformity in the application of the law indicate the desirability of extending the rule to include all who otherwise meet the stated conditions.

As is true of all the privileges for confidential communications, the particular and special relationship between the parties must be established in order to veil the communication with immunity. So where a minister is not considered as such, but as a notary,[105] or as a friend and interpreter,[106] there can be no privilege. So, too, where a minister is engaged in conversation by an acquaintance who imparts damaging information about himself without the purpose of obtaining spiritual advice or assistance, the relationship is not formed.[107]

B. *Extent of Privilege*

The courts tend to strictly construe the privilege and normally only those communications which are made pursuant to the exact requirements of the various statutes are protected. Generally speaking, in civilian courts it must be shown that the statements to the clergyman are made in connection with his professional character and in the course of discipline enjoined by the rules of the particular church.[108] The meaning and extent of the term "course of discipline," as used in the statutes, is the main area of controversy.

The communications protected are usually limited to those penitential in nature or those made in obedience to some supposed

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[105] Partridge v. Partridge, 220 Mo. 321, 119 S.W. 415 (1909).

[106] Blossi v. Chicago & N.W. Ry. Co., 144 Ia. 697, 123 N.W. 360 (1909).

[107] State v. Brown, 95 Ia. 381, 64 N.W. 277 (1895).

[108] Buuck v. Kruckeberg, 121 Ind. App. 262, 95 N.E.2d 304 (1950); Sherman v. State, 170 Ark. 148, 279 S.W. 353 (1926).

religious duty or obligation and do not include statements, however confidential, which do not meet such criteria.[109]

An example of an instance where the privilege did not apply is *Johnson* v. *Commonwealth*.[110] There, a defendant in a murder trial was visited at the jail by a pastor. The visit was voluntary and unsolicited by the defendant. In the course of their conversation, the accused revealed that he had committed the murder. This statement was thereafter received in evidence at trial over the defendant's claim of privilege. It was held that the statement was admissible since nothing in the record indicated that the defendant was a member of the pastor's church or that he had made the statement because of some supposed religious duty. Neither was the statement penitential in character or in any way connected with the discipline of the church. Similarly, a state court has held that the protecting mantle of privilege does not cover a preliminary examination made by a priest to determine whether the communicant is in a proper frame of mind to make a confession.[111]

The term "course of discipline" which is used by the civilian courts in determining the existence of the privilelge seems to correspond with the military term "formal act of religion." Both appear to be restricted to those communications made in the confessional. Since a formal confession is required only by a few religious denominations, the privilege has frequently been denied, in otherwise meritorious situations, in those states which employ a strict construction of the applicable statute. It is perhaps for this reason that the military rule was made more liberal in permitting communications concerning a "matter of conscience" to be included within its scope. This term is somewhat ambiguous and has not been defined by the military courts. It reasonably can be construed to encompass all conversations between a soldier and his clergyman in which the former seeks spiritual solace and comfort or unburdens himself of matters weighing on his conscience. However, if a chaplain merely counsels a serviceman concerning business matters and

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[109] See *In re* Koellen's Estate, 162 Kan. 395, 176 P.2d 544 (1947) (statement of decedent to priest as to whereabouts of will admissible); Christensen v. Pestorious, 189 Minn. 548, 250 N.W. 363 (1933) (statement by decedent to her pastor in hospital not privileged on facts of case); Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901) (in bigamy case, defendant's memo of instructions given to clergyman who was to communicate same to defendant's first wife to influence her to abandon prosecution—not privileged); Estate of Toome, 54 Cal. 509 (1880) (priest's testimony as to testatrix's mental condition admissible).

[110] 310 Ky. 557, 221 S.W.2d 87 (1949).

[111] Estate of Toome, 54 Cal. 509 (1880).

the like, unconnected with spiritual advice, the privilege does not seem justified.

A leading case which illustrates a liberal construction of the privilege is *In re Swenson*.[112] There, in a divorce action, the wife sought to prove that her husband had revealed the fact of his adulterous relations with a certain woman to a Lutheran clergyman. The minister refused to testify to the conversation on grounds of privilege and was thereupon adjudged to be in contempt of court. The Supreme Court of Minnesota set aside the contempt conviction. The court noted that the applicable state statute referred to a "confession" and said that if a "confession" was construed in its usual sense, as one compulsory under the rules of a particular church, it would pertain only to the Roman Catholic Church, thereby producing an absurd result. It was therefore concluded that the statute included communications to anyone who may stand as a spiritual adviser to his church, and the duty of the clergyman to hear and advise such penitents is the "course of discipline" enjoined by the practice of all churches. The court remarked:

> ". . . the 'confession' contemplated by the statute has reference to a penitential acknowledgment to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort, and . . . it applies to a voluntary 'confession' as well as to one made under a mandate of the church. The clergyman's door should always be open; he should hear all who come regardless of their church affiliation."[113]

Wigmore registers a "positive dissent" to the *Swenson* holding, proclaiming that it virtually nullifies the discipline requirement.[114] However, in his zeal to confine the privilege to its narrowest limits, this distinguished authority seems to have lost sight of the fundamental purpose for the granting of any privilege—to protect and encourage the relationship. It is believed that the subject matter permitted by the military provision is sufficiently broad to protect the relationship but does not necessarily lead to its abuse. The stricter rule as advocated by Wigmore and most civilian jurisdictions places the privilege in a straitjacket and serves to diminish public confidence on one of our most important institutions.

The fundamental purpose of the privilege is to allow one to consult his spiritual adviser without fear of disclosure, since the human being sometimes has need of such a person for the purposes of penitence and confession. This need exists even to a greater degree in military than in civilian life. Young servicemen, away from their homes and parents, naturally turn to their chap-

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[112] 183 Minn. 602, 237 N.W. 589 (1931).
[113] *Id.* at 604, 237 N.W. 590.
[114] 8 Wigmore §2395, note 2.

lain as one to whom their problems and fears may be safely entrusted. In combat, the need for religious comfort and guidance is even more sharply pronounced. When used for such purposes, the privilege is amply justified.

In *Kidd*,[115] an Air Force Board of Review considered the privilege in matters arising after a trial for desertion. The Staff Judge Advocate, in his review, stated that the accused had been interviewed by the confinement chaplain prior to sentence, and that, in the chaplain's opinion, the accused's past conduct warranted his separation from the service. Appellate defense counsel maintained that this was a violation of the clergyman-penitent privilege which tainted the review, thereby rendering the action of the convening authority void. The board, while finding ample authority for recognizing the privilege in the Manual's provision and in Air Force regulations, stated:

> "While we can easily discover the privilege attaching to communications made in pursuance of 'religion' or 'conscience' by penitent to pastor similar to the privilege implicit in the attorney-client relationship, we are unable to find anything in the former association commensurate with the obligation of constancy which the attorney owes to his client throughout the same proceeding. . . ."[116]

While thus downgrading the importance of the privilege, the board observed that there was no violation of it in the case under consideration since there was no indication that the chaplain had revealed any confidences originating from the accused—that he merely gave his opinion regarding the accused, and, although possibly the opinion may have been based in part on privileged information, it was equally possible that such information was gathered from other sources readily available to any inquirer or from accused himself in some nonprivileged manner. The board refused to "hypothesize" the chaplain into a position where he could be said to have violated his professional trust in the absence of clear evidence that he had, in fact, done so. The opinion also said that the presumptions operate in his favor rather than the reverse.

This decision most assuredly collides with those dealing with the attorney-client privilege which uniformly hold that any doubts must always be resolved in favor of the inclusion of the doubtful communication within the privilege. There appears to be no real justification for a finding that the duty owed by a clergyman does not demand at least the same obligation of constancy as that of attorney to client. Indeed, it would seem that the nature of the rela-

[115] ACM 10532, 20 CMR 713 (1955).
[116] *Id.* at 718.

tionship equals any of the others in the need for preservation and protection.

IV. CONFIDENTIAL CHARACTER OF COMMUNICATION

Paragraph 151 of the Manual speaks of "confidential" communications only with reference to the husband-wife privilege, but it should not therefore be inferred that privileged communications arising from the attorney-client and penitent-clergyman relationships need not be of a confidential nature.

It is true that the mere fact that a communication is made in confidence does not necessarily endow it with a privileged character[117]—the persons must bear to each other one of the relations which the law recognizes as necessary to be maintained and fostered. Also, the law does not regard it as mandatory for the protection of the individual against disclosure of his communications that they be made under conditions of utmost secrecy. However, of necessity, the communication must be confidential and be intended as such in order for a privilege to arise.[118]

In general, it is assumed that the usual private conversation between attorney and client, husband and wife, or priest and penitent is intended to be confidential.[119] However, the content of the communication or the circumstances under which it was made may show that the utterance was obviously not so intended.[120] Thus, where a communication was made to an attorney representing both parties to the litigation[121] and where a communication subsequently became a matter of public record,[122] the privilege was not applicable.

A. *Statements Knowingly Made in the Presence of Third Persons*

As a general rule, if a party to a privileged relationship chooses to make or receive his communication in the presence or hearing of third persons, it ceases to be confidential.[123] In such instances, the very nature of the transaction is inconsistent with the idea that confidentiality was intended and therefore any presumption of

[117] Holmes v. Comegys, 1 U.S. (1 Dall.) 439 (1789).
[118] Yoder v. U.S., 80 F.2d 665 (10th Cir. 1935); Hartzell v. U.S., 72 F.2d 569 (8th Cir. 1934); *In re* Fisher, 51 F.2d 424 (S.D.N.Y. 1931).
[119] Wolfle v. U.S., 291 U.S. 7 (1934); Hopkins v. Grimshaw, 165 U.S. 342 (1897); New York Life Ins. Co. v. Mason, 272 Fed. 28 (9th Cir. 1921).
[120] Wolfle v. U.S., *supra* note 119; CM 325136, Devine, 74 BR 387, 399 (1947).
[121] Pennsylvania Casualty Co. v. Elkins, 70 F. Supp. 155 (E.D. Ky. 1947).
[122] ACM 9551, Quincy, 18 CMR 694 (1954).
[123] Wolfle v. U.S., 291 U.S. 7 (1934); Livezey v. U.S., 279 Fed. 496 (5th Cir. 1922).

privacy which might otherwise be present is negated.[124] There is certainly no danger of undermining the particular relationship since the communication is made public with the knowledge and implied consent of the parties.

Although the 1951 Manual does not indicate whether the mere presence of an outside party at the time of the communication is sufficient to destroy the privilege, the Court of Military Appeals has adopted the civilian rule that the attorney-client privilege, at least, would have no application to a communication made before persons whose presence is in no wise essential to a proper performance of the attorney's function. In *United States* v. *McCluskey*,[125] the rule was applied in a bigamy case. The accused had been living in military quarters with a purported wife and their children, and a question arose over the legality of the marriage and his eligibility to occupy government quarters. A conference attended by the accused, his battalion adjutant, and a legal assistance officer was held to discuss the matter. Later, the accused and the legal assistance officer held a separate conference. The latter individual thereafter served as trial counsel in accused's case and in such capacity participated in obtaining deposition testimony from the parents of the accused's first wife. The officer was relieved as trial counsel before trial. At the trial, the depositions were received into evidence over the objection of defense counsel who claimed violation of the attorney-client privilege. The Court of Military Appeals acknowledged the rule that no privilege can arise when a third party, the agent of neither the attorney nor client, is present, but was unable to determine which, if any, material facts were developed at the tripartite conference and which facts were brought out during the subsequent private meeting between accused and the legal assistance officer. In such a situation, the court said it would resolve doubts in favor of including the communication within the privilege.

Presence of an agent of either party to the attorney-client conference will not destroy the confidential nature of the consultation if his presence is acquiesced in by the privileged party[126] and, if as the agent of the attorney, his presence is required in the performance of professional duties.[127]

The rule that the presence of third persons ordinarily overcomes the presumption of privacy attached to a communication applies

[124] La Moore v. U.S., 180 F.2d 49 (9th Cir. 1950); Tutson v. Holland, 50 F.2d 338 (D.C. Cir. 1931).
[125] 6 USCMA 545, 20 CMR 261 (1955).
[126] Himmelfarb v. U.S., 175 F.2d 924 (9th Cir. 1949).
[127] U.S. v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954).

with equal force to the husband-wife privilege, as evidenced by a series of Supreme Court and Federal decisions.[128] An often-cited case in this sphere is *Wolfle* v. *United States*[129] where a Federal district court admitted in evidence against the defendant a statement contained in a letter written by him to his wife, but proved by testimony of a stenographer to whom he had dictated the letter. Upon appeal, the Supreme Court rejected defendant's contention that the privilege had been violated, holding that such a communication could scarcely be considered to have been made in confidence.

A somewhat perplexing problem arises when the court is confronted with a communication between husband and wife made in the presence of their minor child. Until 1949, military law provided that it would not be permissible for a minor child, who might reasonably be presumed by the parents not to understand what they were talking about, to testify over objection to communications overheard by the child.[130] This provision was deleted from subsequent manuals for courts-martial. Whether or not it was thereby intended that the rule should no longer stand is unknown. An early Supreme Court case[131] held that a thirteen year old child *may* be a competent witness to a private conversation between husband and wife in the child's presence, even though the spouses themselves would be incompetent to testify as to the matter. Although there is some conflict of authority in the various states, it appears to be fairly well-settled that conversations between spouses in the presence of young children only, who take no part in and pay no attention to the conversation, are privileged; however, the rule is otherwise when the conversation is held in the presence of older members of the family.[132] The reason behind the rule is apparent, but the difficulty in attempting to apply the rather vague standard to a specific situation could prove extremely troublesome to the law officer.

B. *Communications Overheard, Seen, or Obtained by Third Persons*

"The purpose of the privilege extended to communications between husband and wife, client and attorney, and penitent and clergyman, which grows out of a recognition of the public advantage that accrues from

[128] Pereira v. U.S., 347 U.S. 1 (1954); Tabbah v. U.S., 217 F.2d 528 (5th Cir. 1954); U.S. v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); Jacobs v. U.S., 161 Fed. 694 (1st Cir. 1908).

[129] 291 U.S. 7 (1934).

[130] Par. 227, MCM, 1917; par. 123*b*, MCM, 1928.

[131] Hopkins v. Grimshaw, 165 U.S. 342 (1897).

[132] 58 Am. Jur., Witnesses, §381. See also Wolfle v. U.S., 291 U.S. 7 (1934).

encouraging free communication in such circumstances, is not disregarded by allowing or requiring an outside party who overhears or sees such a privileged communication, whether by accident or design, to testify concerning it, nor is the purpose of the privilege disregarded by the reception in evidence of a writing containing such a communication which was obtained by an outside party either by accident or design. . . ."[133]

The Manual exception to the general proposition that confidential communications should remain inviolate is predicated upon the assumption that when another party—a stranger to the transaction or conversation—overhears, sees, or obtains the communication, the essential element of confidentiality disappears, even though the communicating parties may be unaware of the interloper's presence. Perhaps a simple explanation for this result is that the parties to a privileged relation, to be accorded the extraordinary benefits of the law, must take reasonable precautions to insure that their conversations take place in private under conditions which militate against unwarranted and surreptitious intrusion. Further, it is considered that no unfair assault has been made on the institution or relation itself when disclosure is made by a third party in contrast to that made by one of the interested parties.

An example of the embarrassing results which may flow from the inadvertent sharing of secrets in multiple military dwellings was demonstrated in *Turner*.[134] The case involved a charge of death resulting from the operation of an automobile. Shortly after the incident occurred, an officer occupying quarters adjacent to those of accused, which were separated only by beaverboard partitions, overheard a conversation between the accused and his wife during which the latter uncharitably charged her husband with wrecking the family car again. The testimony of the neighboring officer as to the conversation was admitted into evidence over the objection of defense counsel.

Written communications are also subject to disclosure if obtained by an outside party by accident or design. In *United States* v. *Higgins*,[135] the Court of Military Appeals was faced with a rather unusual situation. During an authorized search of a suspect's apartment, an investigator examined the contents of a purse belonging to the suspect's wife. Over her protests, he seized a small typewritten card containing incriminating admissions prepared by the suspect as a communication to his wife. The Court held that the card was properly admitted into evidence since the husband-wife privilege is not violated when such a writing is obtained

[133] Par. 151*b*(2), MCM, 1951.
[134] CM 202359, 6 BR 87, 120 (1934).
[135] 6 USCMA 308, 20 CMR 24 (1955).

by an outside party. It adopted the theory that one who makes a communication to another in writing is deemed to have understood that it might be preserved and used against him. The court also remarked that had there been evidence that the wife had connived in the government's acquisition of the card, it would have fallen within the privilege protecting interspousal communications; however, that the converse situation unquestionably obtained in the instant case since she had done her utmost in protesting the seizure of the document.

An early Federal decision held inadmissible in evidence letters written by a defendant to his wife which were found among her papers by her administrator after death and which the administrator, in a spirit of hostility, turned over to the plaintiff.[136] This holding was based upon the premise that the wife would have had no right to disclose the letters, and therefore the administrator had no greater right than she would have had to use the documents to the husband's prejudice. However, a more recent case, under a similar set of facts, held that a letter from husband to wife having come into the hands of the administrator lost its privileged character.[137]

The military provision authorizing disclosure of privileged communications when overheard or obtained by a stranger to the relation is modified by denying its application when the disclosure is made with the connivance of the spouse to whom the communication was made, the attorney, or the clergyman.[138] It is likewise denied with respect to the attorney-client privilege when the disclosure or connivance to disclose the communication is made by the attorney's agent, such as his interpreter, clerk, stenographer, or other associate. In the case of the penitent-clergyman privilege, the clergyman's agent, such as his interpreter or assistant, also is placed in this category. The agent is not considered to be an outside party, but occupies the same position as his principal.[139]

Although no military cases have been found which directly apply the rule relating to connivance, the language of the Court of Military Appeals in the *Higgins* case leaves no doubt that in a proper situation it will be enforced.

Sound arguments have been advanced against allowing an "eavesdropper" exception to the privileges to exclude.[140] The State of New York, for example, has legislated the exception out of exist-

[136] Bowman v. Patrick, 32 Fed. 368 (E.D. Mo. 1887).
[137] Dickerson v. U.S., 65 F.2d 824 (D.C. Cir. 1933).
[138] Par. 152*b*(2), MCM, 1951.
[139] *Ibid.*
[140] See Comment, 27 Fordham L. Rev. 390 (1958).

ence in the case of eavesdroppers to attorney-client consultations.[141] This statute was enacted to overrule the decision in *Lanza* v. *New York State Joint Legislative Committee*[142] which allowed the committee to use in public hearings a recording of an attorney-client conversation obtained from a microphone secreted in the consultation rooms provided by the state for the use of witnesses and their attorneys. It is tenable to contend that if a privileged relationship is important enough to protect from betrayal by a participant, it is important enough to protect from an interloper—mechanical or otherwise—provided the communicants have not been so careless in their speech as to negate the element of confidentiality.

V. PROCEDURE: CLAIM, DETERMINATION, WAIVER, DOCUMENTS, INFERENCES FROM ASSERTION

A. *Claim of Privilege*

1. *At Trial*

The privilege of preventing the disclosure of confidential communications is a personal one. It is not a right effective without claim or assertion, but a concession of the law that has no practical existence or effect unless it is personally and timely claimed by its possessor.[143]

The Manual for Courts-Martial provides that the person entitled to the benefit of the privilege pertaining to confidential communications between husband and wife is the *spouse who made* the communication; the person entitled to the benefit of the client and attorney privilege is the *client;* and the person entitled to the benefit of the penitent and clergyman privilege is the *penitent.*[144]

The claim can be made solely by the privileged person, and whether he chooses to fulfill his duty to testify without objection or prefers to exercise the exemption which the law concedes to him is purely a matter resting between himself and the court.[145] The party against whom the testimony is brought has no right to claim or urge the exemption in his own behalf.[146] It is true that other persons at the trial, including the adverse party, may call to the law officer's attention the existence of the privilege, or the law officer may be obliged to intervene of his own accord to protect

[141] N.Y. Civ. Prac. Act §353 (1958).
[142] 3 N.Y.2d 92, 164 N.Y.S.2d 9, 143 N.E.2d 772, *cert. den.*, 355 U.S. 856 (1957).
[143] Steen v. First Nat'l Bank, 298 Fed. 36 (8th Cir. 1924).
[144] Par. 151*b*(2), MCM, 1951.
[145] 8 Wigmore §2196.
[146] Associates Discount Corp. v. Greisinger, 103 F. Supp. 705 (W.D. Pa. 1952).

it,[147] but this is regarded as having been done on behalf of the owner of the privilege. Where an attorney is the witness, he is duty bound to assert the claim of privilege on behalf of his client.[148]

In the exercise of the privileges, it must be remembered that ordinarily the protection against disclosure is one that extends to communications made by both parties and related to the confidence and not just those statements made by the privileged party.[149]

The claim of privilege should be made when the matter first arises at trial by specific objection on the ground of privilege.[150] If the party objects on other grounds or on general grounds, he is risking an appellate finding that the question was not properly preserved at trial.[151] A general objection tends to mislead rather than to enlighten the court and is insufficient to inform the court and counsel of the reason for exclusion.

2. *On Appeal*

An interesting problem arises as to the effect of an improper denial or grant of privilege by the law officer at trial. Wigmore indicates that, in the civilian field, the weight of authority holds that a trial court's erroneous *denial* of privilege is a proper subject for exception.[152] However, he points out that the minority view is that if the improper ruling denies the privileges and compels the witness to testify, the only one injured thereby is the witness, who can refuse to obey and thereafter seek vindication if held in contempt. The admission of relevant testimony by denying the privilege has not introduced material rendering the verdict less trustworthy; on the contrary, only the exclusion of it could have been an obstacle to the ascertainment of the facts. This view certainly seems to be based on a firmer logical foundation than that of the majority rule. The minority rule is supported in the *Model Code of Evidence* which states: "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege."[153] This, similarily, is the military rule, and an accused is not entitled to complain if the privilege of another is violated at trial.[154]

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[147] Par. 151*a*, MCM, 1951.
[148] People's Bank v. Brown, 112 Fed. 652 (3d Cir. 1902).
[149] Schwimmer v. U.S., 232 F.2d 855 (8th Cir. 1956).
[150] Steen v. First Nat'l Bank, 298 Fed. 36 (8th Cir. 1924).
[151] La Moore v. U.S., 180 F.2d 49 (9th Cir. 1950); Proffitt v. U.S., 264 Fed. 299 (9th Cir. 1920).
[152] 8 Wigmore §2196.
[153] Model Code of Evidence rule 234 (1942).
[154] U.S. v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).

If the ruling erroneously *affirms* the privilege, the result is different, for in such case the party who desired the testimony has obviously lost evidence which might have assisted his cause. The deprivation of relevant evidence is therefore a proper ground of complaint for the party to the cause.[155]

B. *Determination of Privilege*

The determination of all matters relating to privileged communications rests with the law officer in the military courts and with the judge in Federal courts. Thus, the existence of the relationship and the confidential nature of the communications are questions of fact to be inquired into by the court preliminary to the admission or rejection of proffered testimony.[156] The witness cannot usurp the province of the court in declaring that certain matters are privileged; otherwise, he rather than the court would be the judge of the law and the facts.[157]

The witness may be subjected to such interrogation as may be necessary to enable the court to determine for itself whether the communication is privileged. The court, of course, should not require the witness to disclose the communication to determine whether it is privileged, but must look at the facts and circumstances leading up to its making to see if the rule of privilege is applicable.[158] Before directing the witness to answer, the court should be satisfied that the witness is mistaken in his claim of privilege and should otherwise protect the privilege, if possible.[159] The ultimate decision is a judicial function which should be exercised in a common-sense manner, bearing in mind that the burden of proof to establish the existence of the privilege rests upon the person claiming it.[160]

In military practice, it is the duty of the law officer to exclude a privileged communication unless the privileged party has consented to its disclosure or otherwise waived the privilege, or unless the evidence emanates from a person or source not bound by the privilege.[161] This action should be taken by the law officer on his own motion if no objection has been made to the introduction of the privileged matter and if it appears that the witness possessing

[155] 8 Wigmore §2196.
[156] Smale v. U.S., 3 F.2d 101 (7th Cir. 1924).
[157] People's Bank v. Brown, 112 Fed. 652 (3d Cir. 1902).
[158] *In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931).
[159] *Ibid.*
[160] Phelps Dodge Corp. v. Guerrero, 273 Fed. 415 (9th Cir. 1921). See the concurring opinion in U.S. v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954); 3 Wharton, Criminal Evidence §790 (12th ed. 1955).
[161] Par. 151, MCM, 1951.

the privilege is ignorant of his right to raise the claim. This duty appears analogous to that required of the law officer in advising an apparently uninformed witness of his right against compulsory self-incrimination.[162]

The rule will also come into play in those instances where the attorney, clergyman, or addressee spouse, when a witness, is questioned concerning privileged matters. Although, as a practical matter, such a witness will ordinarily and properly raise the question of privilege, there may be instances when he believes that he must testify even though not ordered to do so by the court. In such cases, the law officer must promptly make a determination as to the existence of a privilege and, if found to be present, refuse to permit such testimony in the absence of consent or waiver by the privileged party.

C. *Waiver of Privilege*

Since a privilege is designed to secure the protected party's confidence in the secrecy of his communications made incident to the relation, the right is not violated by receiving such disclosure as the party permits to be made.[163] There is no rule prohibiting him from divulging his own secrets, and if he voluntarily waives the privilege it is gone forever for its sole purpose has been frustrated.[164] Nor can the question of privilege any longer be invoked by anyone else once a valid waiver has been made.[165] Because the privilege is personal to the client, [166] the penitent,[167] and the communicating spouse,[168] it cannot be waived by the other party to the particular relationship.

The most frequent example of waiver is encountered in those situations where the privileged party voluntarily discloses or permits the disclosure of a confidential communication. Such disclosure may be made before, during, or after trial—the stage of the proceedings not being material.[169] This being so, an attorney cannot successfully raise the question of privilege at trial where the client has already disclosed the substance of the communication prior to trial.[170] For instance, a client's testimony as to a privileged

[162] Par. 150*b*, MCM, 1951.
[163] 8 Wigmore §2327.
[164] Hunt v. Blackburn, 128 U.S. 464 (1888).
[165] 3 Wharton, *op. cit. supra* note 160, §813.
[166] Hunt v. Blackburn, 128 U.S. 464 (1888); ACM S–10728, Reynolds, 19 CMR 850 (1955).
[167] People v. Lipsczinska, 212 Mich. 484, 180 N.W. 617 (1920).
[168] Fraser v. U.S., 145 F.2d 139 (6th Cir. 1944).
[169] Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 26 Fed. 55 (S.D.N.Y. 1885).
[170] *In re* Fisher, 51 F.2d 424 (S.D.N.Y. 1931).

communication in pretrial examination under Federal civil practice constitutes a waiver of his right to maintain secrecy of the communication.[171]

A military case illustrates waiver of the privilege after trial. In *Reynolds*,[172] the accused was charged with wrongfully making and uttering a certain check. The clemency portion of the Staff Judge Advocate's review stated that the accused had said in an interview with a chaplain that the check was inadvertently drawn on the wrong bank. The review recited that the defense counsel had been asked by the Staff Judge Advocate if he had been aware of this fact and that counsel had replied in the affirmative, but added that he hadn't been able to verify it. The Air Force Board of Review held that when the accused voluntarily disclosed the privileged information to the chaplain (the penitent-clergyman relationship not being in issue) he had waived the privilege, and defense counsel was no longer bound to silence.

Waiver of privilege at trial presents the most interesting and complicated phase of the subject. In civilian jurisdictions, the privilege is waived if prompt objection is not made on the proper ground during testimony disclosing the privileged communication or some substantial part of it.[173] It does not appear that this rule would be entirely applicable in military law. The strict requirement of the Manual that the law officer exclude such testimony unless consent or waiver is present strongly indicates that some affirmative showing of waiver by the party entitled to object must appear before the law officer would be justified in concluding that the privilege, in fact, had been waived. It is doubtful if mere silence alone would suffice to constitute waiver since, if no objection is made, it would appear to be incumbent upon the law officer to ascertain if the privileged party is thereby consenting to the disclosure. This should be accomplished by explaining to the person his right to object and by offering him an opportunity to do so. If objection is not forthcoming, it would then seem proper to consider the continued silence as a waiver. This presupposes that the owner of the privilege is present in court as a witness or the accused. If not, absent a showing of consent or waiver, the law officer should exclude the testimony on behalf of the privileged party.

The mere fact that a privileged person, whether an ordinary witness or an accused, testifies as to non-privileged matters is

[171] Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946).
[172] ACM S–10728, 19 CMR 850 (1955).
[173] 3 Wharton, *op. cit. supra* note 160, §813.

insufficient to constitute a waiver of privilege, but if he opens up the privileged subject in his voluntary testimony the privilege is waived.[174] The testimony is "voluntary" even though the witness was subpoenaed and under oath since neither debars him from asserting his privilege and declining to testify.[175] Although a waiver need not be expressed in writing nor in any particular form, the intent to waive must be expressed either by word or act, or by omission to speak and act.[176] It is sometimes quite difficult to determine just how far the witness may proceed in his testimony before he is considered to have overstepped his bounds and waived the privilege, but the point of no return is reached when the witness offers testimony which places him in a position where he cannot fairly object to further disclosure.[177] Although he may initially elect to withhold information or disclose it, when his conduct reaches a certain point of disclosure fairness requires that his immunity shall cease and that his election become final. He cannot be allowed after disclosing as much as he pleased to withhold the remainder. He cannot *partially* waive his privilege or remove the seal of secrecy from only so much of the communication as is to his advantage and still insist that it shall not be removed as to that portion which redounds to the advantage of his adversary or which neutralizes the effect of that which has already been introduced. Thus, where one side produces in evidence fragmentary parts of letters of its attorney to its agents, the other side is entitled to have all parts of the letters disclosed.[178] This is sometimes termed "waiver by implication."

Full disclosure of the privileged communication results in an express waiver. Thus, where a party introduces into evidence letters written to him by his attorney in reference to transactions affecting the matters in issue the attorney may be forced to testify regarding the transaction.[179] Also, testimony of a client's agent with the client's consent as to confidential communications between the client and attorney removes the privilege which would otherwise attach.[180] And a penitent who testifies to facts which occurred at the confessional cannot object to other evidence which is intro-

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[174] *Ibid.*

[175] Steen v. First Nat'l Bank, 298 Fed. 36 (8th Cir. 1924).

[176] *In re* Associated Gas & Electric Co., 59 F. Supp. 743 (S.D.N.Y. 1944).

[177] 8 Wigmore §2327.

[178] Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 26 Fed. 55 (S.D.N.Y. 1885).

[179] White v. Thacker, 78 Fed. 862 (5th Cir. 1897).

[180] Willard C. Beach Air Brush Co. v. General Motors Corp., 118 F. Supp. 242 (N.J. 1953).

duced establishing those same facts.[181] Even though the privilege is claimed at one time during the proceedings, if the witness complies without protest with a subsequent direction to answer the privilege is waived.[182]

The fact that the testimony of a witness to a confidential communication is given on cross-examination does not deprive it of its efficacy as a waiver of the privilege when such examination is proper and the testimony is given without objection or claim of privilege.[183] Waiver extends to every disclosure of privileged communications made in a legitimate cross-examination upon the subject matter of the testimony given upon direct examination.

The leading military case dealing with waiver is *United States* v. *Trudeau*[184] wherein the accused was charged with committing indecent acts with a certain youth. At the trial, the victim testified that the accused had committed acts upon his person when he visited the accused's room while the latter's wife was absent. The accused testified that the boy had initiated the improper advances and that he had told the boy to return to his own room. He further testified that he had informed his wife of the incident several days later and told her that she should notify the boy's mother of his actions. On cross-examination, the accused testified that he had told his wife everything about the incident, and he also recounted details of the conversation with his wife. The accused's wife was then called as a prosecution witness and, over the objection of defense counsel, testified with respect to the conversation. Her testimony materially differed from accused's version. The appellate defense counsel later urged that the testimony of the wife was inadmissible due to violation both of the spousal testimonial privilege and the privilege for confidential communications. In rejecting these contentions and finding waiver, the Court of Military Appeals said that the public policy behind each prohibition cannot be perverted into a shield against contradiction of an accused's testimonial untruths. ". . . . Having thus voluntarily thrown open a subject which the law would otherwise have kept closed and made it an integral part of his defense, the accused cannot deny the Government the right to challenge his credibility on it. . . ."[185]

A long line of cases beginning with the Supreme Court decision

[181] People v. Lipsczinska, 212 Mich. 484, 180 N.W. 617 (1920).
[182] Fraser v. U.S., 145 F.2d 139 (6th Cir. 1944).
[183] Steen v. First Nat'l Bank, 298 Fed. 36 (8th Cir. 1924).
[184] 8 USCMA 22, 23 CMR 246 (1957).
[185] *Id.* at 23, 23 CMR 247.

in *Hunt* v. *Blackburn*[186] have held that a waiver of the attorney-client privilege is effected when the client alleges in his testimony or in extra-judicial statements that his attorney has been derelict in or breached his professional duties. In the cited case, a defendant claimed that her participation in prior litigation which endangered her position in the instant suit was the result of being deceived, misled, and misadvised by her former attorney. At the same time, she objected to the attorney testifying to the facts and circumstances under which he advised her and as to the advice given. The Supreme Court held that when the defendant entered upon a line of defense which involved what transpired between herself and her former attorney, and concerning which she testified, she voluntarily waived her right to object to his giving his own account of the matter.

In *Cooper* v. *United States*, the proposition was stated in these words:

> "The rule which forbids an attorney from divulging matters communicated to him by his client in the course of professional employment is for the benefit of the client. But it may be waived by the client; and when a client, in attempting to avoid responsibility for his acts, as in this case, divulges in his testimony what he claims were communications between himself and his attorney, and especially when his version of what transpired reflects upon the attorney, the reason for the rule ceases to exist, and the attorney is at liberty to divulge the communications about which the client has testified. . . ."[187]

This principle of law which is available to an attorney when an issue of breach of duty is made also finds sanction in the *Canons of Professional Ethics*.[188] It has been applied in military law in situations where the defense counsel is charged with incompetence by the accused after trial. In *Reynolds*,[189] an Air Force Board of Review said that if an attorney in defending himself from such a charge reflects upon the character of the accused, the latter cannot complain since he first lifted the veil of privilege by imputing a breach of duty on the part of the attorney.

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[186] 128 U.S. 464 (1888). *Accord*, Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940); Cooper v. U.S., 5 F.2d 824 (6th Cir. 1925); U.S. v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951). The latter two cases involved situations where the client accused the attorney of misinformation in advising a plea of guilty. Counsel were permitted to disclose all material and relevant facts within their knowledge bearing on the issue raised by the defendant.

[187] 5 F.2d 824, 825 (6th Cir. 1925).

[188] Canon 37, ABA, reads in part: "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation."

[189] ACM S-10728, 19 CMR 850 (1955).

A recent application of this rule is found in *United States* v. *Allen.*[190] In that case, the accused pleaded guilty to a charge of desertion, remained silent during sentencing procedure, and his counsel offered nothing in his behalf. Some matters in mitigation which were available but not presented to the court appeared in the Staff Judge Advocate's review. Other matters appeared in an affidavit of the accused to support his contention that he was deprived of effective assistance of counsel during the sentencing procedure. However, his former counsel also filed an affidavit in which he maintained that the matters in mitigation set forth by the accused would have worked to the latter's disadvantage at trial or would have resulted in perpetrating a fraud upon the court if placed in evidence. The Court of Military Appeals held that if the allegations of the accused were true, he was not adequately represented by defense counsel, but in view of the fact that his assertions were disputed, the record of trial was returned to the board of review for a hearing and determination of the matter. The Court pointed out that the accused, by his complaint on appeal, had waived his privilege to exclude his former attorney's testimony at the special hearing.

Although an attorney is the spokesman for his client regarding the matter which he was retained to handle, the privilege is not waived by an attorney's voluntary divulgence of confidential communications from his client when beyond the authority—express or implied—granted to him by the client.[191] As stated by the Court of Military Appeals in *United States* v. *Marrelli*:

> ". . . . Conceivably, it may be argued that a client must assume the risk of disloyalty on the part of an attorney whom he freely chose to represent him. However, we recognize no reason for rewarding perfidious conduct on the part of a faithless attorney, and we believe the contrary view to be demanded if the privilege is to receive adequate protection."[192]

The Court said, however, that although an attorney does not possess authority to betray his client's secrets he may exercise implied authority to effect such disclosures in appropriate circumstances. For example, he may reveal otherwise privileged matter if incidental and necessary to negotiations in the client's behalf. He may also voluntarily surrender objects in his own possession, the locus of which is known to the authorities and which as "tools of the crime" would probably be subject to a legal search and seizure. It must, however, be remembered that such relaxations of the strin-

[190] 8 USCMA 504, 25 CMR 8 (1957).
[191] 8 Wigmore §2325.
[192] U.S. v. Marrelli, 4 USCMA 276, 282, 15 CMR 276, 282 (1954).

gent prohibitions against disclosure were discussed by the Court as applying to a civilian attorney. The opinion indicated that a narrower approach might be taken regarding the implied authority of assigned military counsel. The Court did not elaborate on the reasons for this distinction.

In his concurring opinion in *Marrelli*, Judge Latimer spoke in liberal language of the many good reasons which might justify an attorney in releasing information concerning the client without exceeding his express or implied authority. He said:

". . . . [A] trusted and competent attorney might, in order to assist his client and without breaching his trust, properly establish that his client had committed an offense but had repented, had made restitution, and had righted his wrongs. By adopting those tactics he might further his client's chances of escaping prosecution. To support such a plan, the attorney could release supporting evidence. . . ."[193]

D. *Production of Pre-existing Documents*

A demand for production of documents at trial arises most frequently in those cases involving the attorney-client relationship. A witness, of course, may be compelled to produce books and papers which have not been endowed with a privileged character.[194] The problem arises in determining whether the circumstances are sufficient to characterize the documents as privileged.

It has been held that corporate books and documents left in an attorney's office by the corporation client for safekeeping or to prevent their seizure by competent authorities are not privileged, and the attorney has no right to refuse to produce them upon order of the court.[195] In such a case, the books are not given to the attorney for the purpose of consultation or otherwise in his professional capacity, and he may be compelled to produce them even if such action is contrary to the instructions of his client.

The Court of Military Appeals in *United States* v. *Marrelli*, although reserving a decision on the matter, stated that it could envision instances where the client seeks to utilize his attorney as a depository for all his papers—unconnected with his professional functions and based solely on the presence of superior facilities for their preservation. The Court said that in such a case it might well conclude that the attorney could be required to produce the documents in court pursuant to subpoena.

The Court also indicated the circumstances under which it would consider documents held by the attorney to be privileged.

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[193] *Id.* at 290, 15 CMR 290.

[194] Edison Electric Light Co. v. United States Electric Lighting Co., 44 Fed. 294 (S.D.N.Y. 1890).

[195] Grant v. U.S., 227 U.S. 74 (1913).

"In many instances, a lawyer cannot properly furnish legal advice or services without consulting documents pertaining to his client's problems and in the latter's possession. The delivery of these documents by the client to the attorney is, in such instances, an incident of the client's communication of the facts of the problem to his lawyer. Therefore, we believe that a purpose to safeguard the lawyer-client privilege necessitates a refusal to compel the lawyer to produce such documents through use of the process of subpoena. . . ."[196]

It has generally been held in civilian jurisdictions that since an attorney is but the agent of his client his right to withhold documents depends solely on the rights of the client, aside from considerations of the attorney-client relationship.[197] If the client can be compelled to surrender the particular document, so can the attorney be forced to give up possession since his rights are no greater than those of the client. If this were not true, a client could defeat justice merely by placing records, books, and other papers in his attorney's hands. There is general agreement that if documents are not privileged while in the hands of a client he does not make them privileged simply by handing them to his counsel. However, the *Marrelli* case indicates that if pre-existing documents are turned over to the attorney incident to his professional services and in connection with the matter for which he was engaged, they would be considered privileged in a court-martial if such delivery to the lawyer amounted to a confidential communication and was not undertaken for the purpose of evading the law. The Court reasoned that in such a case the attorney's knowledge of the contents of the document is privileged since, by the act of delivery, the client has imparted the information to the same extent as if he had orally communicated the matter; and, therefore, the document should also be inaccessible to the court in such a situation.

E. *Inferences From Assertion*

A somewhat perplexing question arises in considering whether it is proper for counsel or the law officer to comment on the exercise of a privilege for confidential communications by a witness or the accused. It is true that unfavorable inferences generally may be indulged against a party who fails to produce material and necessary testimony which is peculiarly within his power and control.[198] Military law, however, is silent on the application of such a rule when a claim for privileged communications is made or when a

[196] 4 USCMA 287, 15 CMR 287 (1954).
[197] 8 Wigmore §2307(1).
[198] Ford v. U.S., 210 F.2d 313 (5th Cir. 1954); U.S. v. Vigneault, 3 USCMA 247, 12 CMR 3 (1953); ACM 7712, Braden, 14 CMR 617 (1954).

person whose testimony would be so privileged is not called as a witness.

The leading textbook authorities agree that when a witness asserts a personal privilege, no adverse inference should be drawn against the party who called him if the privilege is outside the control of such party.[199] This is a sensible view since the side calling the witness is in no way responsible for his refusal to testify and therefore should not be penalized for the denial of such evidence to the court or the opponent.

There is a conflict in civilian state jurisdictions in those cases where a party to the trial suppresses evidence by invoking a privilege which does lie within his power and control.[200] Some courts permit the adverse inference in these cases and others deny its use. Wigmore feels that the inference might be justified in such circumstances[201] unless the claim involves the attorney-client privilege, but there he balks:

> "If a client-party claims the privilege, *no inference* should be drawn against him as to the unfavorable nature of the information sought. Whatever the reasoning may be for the other privileges . . . it is plain that here the drawing of such an inference would virtually disclose the communication, and it is this very disclosure against which the privilege protects."[202]

Dean McCormick indicates that all the privileges should probably be governed by a uniform rule in this respect.[203] He feels that if the privileges are to be strictly construed then opening the door to adverse inferences may be the most feasible way of devitalizing them. On the other hand, if it is determined that the relationships require continued protection in the future he points out that the rule of inference should be sacrificed completely in the interest of practical trial administration and as an aid to the jury.

The most striking example of the confusion which exists in this area is demonstrated by the lack of unanimity displayed by the most active legal reform groups. The American Law Institute's *Model Code of Evidence* (1942), rule 233, permits the judge and counsel of a trial to comment upon any claim of privilege which is allowed by the court and provides that the triers of fact may draw all reasonable inferences therefrom. This eminent group of scholars, in drafting the rule, was of the opinion that the lessening of the

[199] 2 Wigmore §286; McCormick, Evidence §80 (1954).

[200] In Norwood v. State, 80 Tex. Cr. R. 552, 192 S.W. 248 (1917), no inference was permitted from the wife's claim of privilege as to a confidential conversation with her husband upon his trial for murder.

[201] 2 Wigmore §286.

[202] 8 Wigmore §2322, at 626.

[203] McCormick, *op. cit. supra* note 199, §80.

value of the privileges occasioned by the proposed rule was "comparatively slight." In contrast to this action, the National Conference of Commissioners on Uniform State Laws in 1953 approved the *Uniform Rules of Evidence* which embodied to a large extent the principles set forth in the Model Code. Significantly, however, rule 233 was not adopted. Rule 39 of the Uniform Rules is exactly the opposite of rule 233 and, in addition, states:

> ". . . . In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege."

The Federal courts follow the rule that the drawing of unfavorable inferences from failure to produce testimony is not to be applied where the law, on grounds of public policy, has sustained privileges against being compelled to produce it. Thus, in a case involving the physician-patient privilege it has been stated:

> "To hold that, because the patient does not waive or abandon the prohibition, inferences adverse to his side of the controversy may be drawn by the jury, would be to fritter away the protection it was intended to afford. When it is the legal right of a party not to have some specific piece of testimony marshaled against him, he may exercise that right without making it the subject of comment for the jury. . . ."[204]

In *United States* v. *Cotter*,[205] Judge Learned Hand, in discussing the attorney-client privilege, said: "We agree indeed that the contents of privileged communications cannot by inference be drawn out indirectly; one party may not ask a jury to find that they would have been prejudicial to the party having the privilege."[206] It also has been held that the rule applies irrespective of the nature of the proceedings in which the claim is made since every conscientious lawyer is duty-bound to raise the claim in any proceeding in order to protect the communications.[207] However, if the client testifies as to the legal advice given him he waives the privilege, and such waiver also raises the inference that the testimony would be unfavorable and justifies comment to the jury on the failure to call the attorney to the stand.[208]

In view of the unusual liberality of the military law in its construction of the confidential privileges, it seems evident that a claim of any such privilege by a witness or the accused will not give rise to an adverse inference which may be commented upon by counsel

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[204] Pennsylvania R.R. v. Durkee, 147 Fed. 99, 101 (2d Cir. 1906). *Accord*, Halsband v. Columbian Nat'l Life Ins. Co., 67 F.2d 863 (2d Cir. 1933).
[205] 60 F.2d 689 (2d Cir. 1932).
[206] *Id.* at 691.
[207] A. B. Dick Co. v. Marr, 95 F. Supp. 83 (S.D.N.Y. 1950).
[208] McClanahan v. U.S., 230 F.2d 919 (5th Cir. 1956).

or the law officer. In fact, if requested by counsel it would probably be advisable for the law officer to instruct the court in accordance with rule 39 of the *Uniform Rules of Evidence* that the court may not draw an adverse inference from the assertion of privilege. Whether this tactic would be wise for counsel to pursue in the absence of unfavorable comment by his adversary is problematical, however. In many instances, it is better that the court not be reminded that relevant evidence has been withheld from it at the instance of one of the parties.

VI. STATE SECRETS AND POLICE SECRETS

Military law not only excludes confidential communications arising from the relationships heretofore discussed, but also blankets with privilege a variety of communications emanating from the various functions and activities of the Government.[209] These privileges do not arise from a particular social or professional relationship as do those of the client, spouse, and penitent, and therefore cannot be evaluated in the same light as those personal privileges. Although some of the same procedural principles may be applicable to both types of privilege, it must be kept in mind that we are here dealing with something akin to rules of evidence relating to the public interest rather than with a relationship between individuals.

In view of the scope limitations of this article, only the privilege protecting the communications of informants to law enforcement officials will be considered in detail. The privileges relating to deliberations of courts and juries, diplomatic correspondence, and official communications are mainly invoked in civil actions and

[209] Par. 151*b*(1), MCM, 1951, provides in part: "(1) *State secrets and police secrets.*—Communications made by informists to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand or petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence is privileged and, in general, so are all oral and written official communications the disclosure of which would, in the opinion of the head of the executive or military department or independent governmental agency concerned, be detrimental to the public interest."

Par. 151*b*(3), MCM, 1951, states in part: "[Although investigations and reports of the Inspector General and his assistants are confidential and privileged] . . . when application is made to the authority ordering the investigation . . . to use in a trial by court-martial certain testimony, or an exhibit, accompanying a report of investigation, which testimony or exhibit has become material in the trial (to show an inconsistent statement of a witness, for example) he should ordinarily approve such application unless the testimony or exhibit requested contains a state secret or unless in the exercise of a sound discretion he is of the opinion that it would be contrary to public policy to divulge the information desired."

seldom encountered in courts-martial. Classified evidence is not often used in a trial. However, it will be seen that some of the decisions construing the informant privilege are equally applicable to all state secrets invoked during criminal proceedings.

The so-called "informer's privilege" is a misnomer since the privilege, in reality, belongs to the Government. It is based on the premise that the proper administration of justice and the protection of society against criminals requires that all persons should be encouraged in performing certain duties to that end. One of these duties, incumbent upon all law-abiding citizens, is to communicate to the proper officials any information regarding the commission of a crime or the identity of the criminal. In support of this admirable goal, and to encourage public response, most courts have recognized the existence of a privilege to protect the identity of an informant. It is probable that few citizens will venture to impart information concerning criminals and their crimes if obliged to live in future fear that their disclosures will possibly subject them to the revenge of the betrayed.

The privilege was accorded full recognition by the Supreme Court in the case of *Vogel* v. *Gruaz*:

> ". . . . Public policy will protect all such communications, absolutely and without reference to the motive or intent of the informer or the question of probable cause; the ground being, that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them. . . . The free and unembarrassed administration of justice in respect to the criminal law, in which the public is concerned, is involved. . . ."[210]

Although this language indicates that the privilege embraces the communications as such, subsequent decisions construing the principle limited its application to protection of the *identity* of the informant.[211] Indeed, this seems to be the manifest purpose of the privilege: to protect the Government's source of information and to shield the informant from possible future evil consequences.

Ordinarily, withholding the identity of an informer presents no particular problem to an accused. If the informer has merely furnished a lead to evidence of a crime, knowledge of his identity might satisfy the natural curiosity of an accused or arouse a spirit of vengeance but would not usually aid in his defense. However,

[210] 110 U.S. 311, 315 (1884). *Accord, In re* Quarles, 158 U.S. 532 (1895) in which the Court said that it is the right of the citizen to inform Federal law enforcement officers of violations of Federal laws and that such right is secured by the Constitution. In the opinion of Professor Wigmore, this privilege is "well-established and its soundness cannot be questioned." 8 Wigmore §2374, at 752.

[211] Scher v. U.S., 305 U.S. 251 (1938).

in some cases he will need to know the name of the informer in order to meet properly the prosecution's case. In this situation, the importance of the right of an accused to a fair hearing in which he may present all evidence relevant to his innocence will often overbalance the public interest in protecting informants. As stated by the Supreme Court in *Roviaro* v. *United States*,[212] it is the responsibility of the trial judge to balance the competing interests and determine whether disclosure is necessary to further the ends of justice.

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[213]

A common example in the Federal courts of cases in which knowledge of the identity of the informant is essential to conducting an effective defense is a prosecution in which the Government relies upon an informant's "tip" to supply probable cause for a search, seizure, or arrest. In such instances, the Government is usually compelled to reveal the name of the informant so that the defendant may contest his credibility.[214] This problem should arise infrequently in military practice due to the extensive powers of a commanding officer to order searches on military reservations without the necessity of a showing of reasonable cause and the rarity of searches with warrants by Armed Forces personnel.

If the provisions of paragraph 151 of the Manual regarding state and police secrets were read literally, not only the identity but also the "communications" of an informant would be privileged, and no exception would be available in a situation where evidence of such communications or the identity of the informant is essential to the case for the defense. However, the United States Court of Military Appeals rejected any such unqualified application of the privilege in *United States* v. *Hawkins*,[215] the only case in which this subject has been discussed extensively by the Court.

In that case, Treasury and CID agents marked some money and

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[212] 353 U.S. 53 (1957).

[213] *Id.* at 62.

[214] Wilson v. U.S., 65 F.2d 621 (3d Cir. 1933); U.S. v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937). *Contra*, Goetz v. U.S., 39 F.2d 903 (5th Cir. 1930). Disclosure has been denied, however, where sufficient evidence of probable cause otherwise has been shown to satisfy the court. Scher v. U.S., 305 U.S. 251 (1938); Shore v. U.S., 49 F.2d 519 (D.C. Cir. 1931).

[215] 6 USCMA 135, 19 CMR 261 (1955).

gave it to a prisoner at a stockade. This individual apparently purchased narcotics from the accused, a guard at the stockade, since the latter was thereafter apprehended for possession of narcotics, and one of the marked bills was found on his person. At the trial, the defense urged entrapment and tried to learn from the Treasury Agent on cross-examination the name of the informant and the instructions which had been given to him by the authorities. After the law officer sustained an objection to this line of questioning on the ground of privilege, the defense claimed that entrapment could not be established without disclosure of the informant. The Court of Military Appeals, in ordering a rehearing, held that the accused not only was entitled to disclosure of the informant's identity but also to have his presence as a witness. The court acknowledged that the public policy behind the privilege forbids exposing informers to possible hazardous consequences of their actions, but stated that the accused may nevertheless compel a disclosure of the identity of the informer when essential to his defense:

> ". . . . If the qualification did not exist, public officials would be enabled to produce such bits of evidence as they saw fit for their purposes and to withhold testimony which might establish the innocence of an accused. In such a situation, the rule of policy must give way to the rule of justice. . . . For that reason, if the evidence which is sought to be disclosed would be necessary as tending to shed light on the guilt or innocence of an accused, he is entitled to compel its disclosure. . . ."[216]

Although the Court went to great lengths to establish this exception to the privilege of withholding the identity of an informant, its opinion indicated that the privilege was inapplicable in the first instance because the unidentified party was not a true informer. He was, in fact, a participant in the criminal act and therefore not protected by a privilege which is "limited to the situation where the informer is an informer and nothing more, as where he furnished a 'tip' which results in the apprehension of an accused, or supplies police officials with information which leads them to evidence establishing reasonable cause to conduct a search."[217]

Two other qualifications to the privilege are based on the proposition that where the reason for the rule no longer exists neither should the rule: (1) where the disclosure of the contents of the particular communication will not tend to reveal the identity of

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[216] *Id.* at 140, 19 CMR 266.

[217] *Id.* at 139, 19 CMR 265. The court based its holdings on Sorrentino v. U.S., 163 F.2d 627 (9th Cir. 1947). *Accord*, Portomene v. U.S., 221 F.2d 582 (5th Cir. 1955).

the informer, the contents are not privileged;[218] and (2) once the identity of the informer has been disclosed to the accused, the privilege is no longer applicable.[219] Although these qualifications were not mentioned in *Hawkins*—and even though the opinion there does not indicate whether the accused did in fact know the identity of the informer—it seems safe to assume that these exceptions would be accepted by the Court of Military Appeals in a proper case.

The Manual provides expressly that the privilege does not warrant the exclusion from evidence of any statements of informants which are inconsistent with or might otherwise be used to impeach their testimony as witnesses.[220] In effect, this special exception is nothing more than recognition that there is no reason for the existence of the privilege when the identity of the informant is disclosed by his taking the stand as a witness. The framers of the Manual relied on the Court of Appeals decision in *United States* v. *Krulewitch*[221] in framing the rule that if the prosecution elects to produce the informant at trial he is subject to impeachment as is any other witness:[222]

> ". . . . [I]t must be a condition upon the continuance of any such privilege that the prosecution—its possessor—shall not adduce testimony touching the subject matter communicated. Indeed, that is a general principle as to all privileged communications. When their possessor chooses to bring into the light the transaction to which the communications relate, he may no longer suppress the communications themselves. The justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public. . . ."[223]

As a procedural prerequisite to the compulsory production of documents containing the text of an informer's statement, the *Krulewitch* and other Federal decisions required the defense to first lay a preliminary *foundation* of inconsistency for impeachment purposes. The trial judge would then examine the documents in question to determine if they did in fact bear upon the credibility of the witness. The preliminary inspection by the court was to insure protection of the confidential matter and to allow disclosure only if the interests of the defendant therein were deemed paramount to those of the Government.[224]

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[218] Roviaro v. U.S., 353 U.S. 53 (1957).
[219] 8 Wigmore §2374.
[220] Par. 151*b*(1), MCM, 1951.
[221] 145 F.2d 76 (2d Cir. 1944).
[222] Legal and Legislative Basis, Manual for Courts-Martial, 1951, p. 239.
[223] U.S. v. Krulewitch, 145 F.2d 76, 78 (2d Cir. 1944).
[224] U.S. v. Andolschek, 142 F.2d 503 (2d Cir. 1944). *Accord*, U.S. v. Beekman, 155 F.2d 580 (2d Cir. 1946).

The waters of this river were muddied indeed by the recent decision in *Jencks* v. *United States*,[225] which created confusion in Federal jurisdictions and caused no little dismay in criminal investigative agencies of the Government.[226] There, the defendant was charged with false swearing and the Government's two principal witnesses were paid FBI informers who had made periodic reports concerning, *inter alia*, defendant's Communist activities. After their cross-examination at trial, the defense moved for an order directing the Government to produce the reports for the inspection of the trial judge and determination whether and to what extent they could be used by the defense in examination of the witnesses. The trial judge denied the motion. The Supreme Court reversed the case and, going beyond the request of the defense, expanded the then-existing rule by holding that the defense was entitled to inspect such documents initially, rather than the trial judge, to determine what use could be made of them for impeachment without the necessity of a preliminary foundation of inconsistency. The Court felt that to require the defendant to first show a conflict between the reports and the testimony of the witnesses was unreasonable since he cannot show inconsistency until he knows what is contained in the documents. The Court then presented the Government with the alternative of producing the prior statements of the informer witnesses or facing dismissal of the prosecution.

The widespread misinterpretation and misunderstanding of the *Jencks* decision by the various Federal district courts resulted in numerous problems. Entire investigative files of the Government were disclosed to defendants, and pretrial disclosure of files was demanded by defense counsel. Illustrative of the extent of the attempts to enlarge on the decision is that demands were made for irrelevant information, such as the names of all persons interviewed by Federal agents in connection with a case.

To restrict the impact of the decision and to insure that it would not be interpreted to permit the exposure of government files for broad "fishing expeditions" by the defense on the chance that something valuable for impeachment purposes might be discovered,

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[225] 353 U.S. 657 (1957).

[226] See U.S. v. Palermo, 21 F.R.D. 11 (S.D.N.Y. 1957), in which the court interpreted the Jencks holding. *Accord*, U.S. v. Benson, 20 F.R.D. 602 (S.D.N.Y. 1957). *Contra*, U.S. v. Hall, 153 F. Supp. 661 (W.D. Ky. 1957).

Congress speedily passed clarifying legislation.[227] The new law preserves the duty of the trial judge to determine relevancy prior to forcing disclosure and provides for dismissal of the action only when necessary in the interests of justice.

Of course, even though the privilege is applicable it may be waived by "appropriate governmental authorities."[228] Although no specific authorities are named in the Manual, it seems that they would ordinarily be the representatives of the military or civilian law enforcement agency which received the particular communication. It must be remembered that the privilege is not restricted to military officials but also applies to "public officers,"[229] thus including the civilian authorities. The principles applying to waiver of privileges generally would appear to govern here also, and the Manual indicates that the privilege is inapplicable if the evidence concerning the communication is disclosed by a third party, as is true in the other privileges.[230]

Finally, the Federal courts enforce a determination that the privilege is inapplicable by requiring the Government either to produce the required information or face *dismissal* of the prosecution.[231] The courts reason that since the Government which prosecutes an accused has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its privileges to deprive the accused of evidence necessary to his defense. Although the Court of Military Appeals in *Hawkins* did not indicate what action may be taken at a court-martial in such a situation, in view of their efforts to vest the law officer with the powers and discretion of a Federal judge it is likely that dismissal

[227] Sec. 3500, act 25 Jun 1948, as added by act 2 Sep 1957 (71 Stat. 595; 18 U.S.C. 3500). This section provides that statements or reports of government witnesses are not subject to discovery or subpoena until the witness has testified on direct examination at the trial. Thereafter, on motion of the defense, the Government must deliver to the defense any statement relating to the subject matter to which the witness testified, for its inspection and use. However, if the Government claims that any statement contains matter unrelated to the witness's testimony, it is first delivered to the Court which excises such portions before handing it to the defense. If the defendant objects to this action, the entire statement is preserved for appellate review. In addition, contrary to the language in *Jencks*, if the Government elects not to comply with an order of the Court to deliver the statement, the only result is that the testimony of the witness is stricken. The trial will then proceed unless the Court, in its discretion, determines that the interests of justice require a declaration of mistrial.

[228] Par. 151*b*(1), MCM, 1951.

[229] *Ibid.*

[230] Par. 151*a*, MCM, 1951.

[231] Roviaro v. U.S., 353 U.S. 53 (1957).

of the prosecution in such a case could be ordered by a law officer with impunity.

As a result, in many cases the Government is obliged not to prosecute a manifestly guilty offender in order to protect valued sources of information or governmental secrets.[232] This is best illustrated by cases in which the evidence would consist of classified information.

In *Dobr*,[233] a desertion case, it was revealed after trial that the defense counsel had been ordered by military authorities to remain silent at trial as to the accused's activities as a civilian intelligence agent. An Army Board of Review held that this constituted command coercion depriving the accused of his right to defend himself since he could not show the value of his prior services to negative the requisite intent to desert. The board said:

> ". . . . [I]n a prosecution where testimony or documents involve classified information and are relevant to any issue, either for the prosecution or defense, the Government must make an election, either to permit the introduction of said classified evidence or to abandon the prosecution. . . . If the Government does not desire to abandon the prosecution or remove the security classification, it has one other alternative. The convening authority may direct that the public be excluded from the trial . . . and appoint members to the court (including counsel and necessary clerical personnel) who have security clearances equal to the classification of the evidence to be introduced."[234]

It is thus apparent that the value of the executive privileges is marginal at best in criminal cases. The necessity of election on the part of the Government either to reveal its secrets or forego prosecution effectively weakens any position which it formerly held in this respect. In military law, it seems no longer to be a question of the exercise of discretion by military authorities in determining whether it would be contrary to public policy to divulge information desired by the defense. If the desired matter is relevant and helpful to the accused in the conduct of his case, it appears that the Government must disclose the confidential information or abandon prosecution.

VII. CONCLUSION

The privileges designed to preserve the confidential nature of the relationships deemed most important to society have been subjected to increasing scrutiny in modern times. The spectacle of a plethora

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[232] Pars. 33*f*, 151*b*(3), MCM, 1951.

[233] CM 389592, 21 CMR 451 (1956). See also CM 391879, Craig, 22 CMR 466 (1956), as to waiver of governmental privilege with respect to an Inspector General's report.

[234] *Id.* at 455.

of special interest groups clamoring to be added to the list of those protected by the rules of privilege has alarmed many lawyers who place the judicial search for truth above the protection of confidential relationships. Many courts have come to share this viewpoint and have severely constricted the scope of the privileges. The Armed Forces, for their part, have refused to incorporate a physician-patient privilege into military law.

Nevertheless, the confidential relationships covered by privilege in military law are carefully selected, limited in number, basic to the social fabric, and eminently worthy of protection—although the Manual provisions regarding the marital privilege are in dire need of modernization. Therefore, it would not be wise to attempt to write numerous exceptions to the privileges into the Manual in order to facilitate the introduction of relevant evidence before courts-martial. This goal can best be accomplished through the exercise of the sound discretion of the law officer. The law officer should be given a free hand in determining the necessity of disclosure or nondisclosure in the particular case before him. He alone is in a position to make a fair and intelligent determination of whether a privilege is justified in the interest of maintaining the confidential nature of a relationship, or unjustified when it is clear that the specific testimony is necessary to secure facts essential to the determination of the guilt or innocence of the accused. If he is given this wide discretion to overrule privileges for considerations of justice, their continued retention is practicable. If not, further inroads will cut so deeply into all the privileges that they will eventually cease to be living and vital principles in the law.

PROFESSIONAL ETHICS AND THE MILITARY DEFENSE COUNSEL*

By Captain Warren H. Horton**

The quality of military justice depends almost completely upon the ethics of those who administer the Uniform Code of Military Justice, 1950. Foremost among this group, whose moral judgment is tested daily, is the military defense counsel, by necessity often an officer of limited background, both militarily and professionally.[1] In the unusual organization required by the military service, the defense counsel finds himself opposing his normal client, the government, and practicing before a judge who is often his law partner. He has the case prepared and reviewed by his senior law partner and "boss," the Staff Judge Advocate and later the case is ultimately reviewed and actioned by the Convening Authority, who has almost infinite power over his person and career.[2]

This organization, by its very nature, requires a higher standard of ethical conduct on the part of the individuals administering the judicial system than does a comparable civilian system. This is true because a civilian system of justice neither has nor requires a close knit organization. The desired standard of ethical conduct in the military justice system is usually attained and often exceeded through the medium of establishing high standards of both professional training and personal character for selection, certification, and appointment as professional legal officers. There is, however, a paucity of training for non-lawyer military personnel in the field of ethics. It is, therefore, appropriate that the ethical problems of the military counsel be examined and emphasized so they may be easily recognized and solved by interested persons.

To appreciate the decisional dilemma produced by the military organization, the meaning of the word ethics must be explored. Ethics has been defined as the branch of philosophy dealing with

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[1] JAGA, Memo to Executive Office, Subject: S.1165, 85th Congress, A Bill To Provide Incentive Pay and Related Benefits for Judge Advocates and Legal Specialist of the Armed Forces (1957).

[2] T/O&E 12–7T, Department of the Army, 20 Dec 1956; *U.S.* v. *Gray*, 6 USCMA 615, 20 CMR 331 (1956).

the moral duty of man in his obligations to others and in perfecting himself.[3] Morals and ethics both refer to a habit of right action with the individual and sanctioned by the custom of the society in which he lives. Ethics, however, refers more to the principles of right in the abstract while moral tends to refer to the actions sanctioned by the social and religious laws.[4] When, as here, a subject is discussed from an ethical viewpoint, there is the suggestion of going back to first principles and judging it as a matter of abstract right and wrong.

A complete reevaluation is not always required as the foundation of legal ethics is said to lie in both the positive law and in reason.[5] That portion found in the positive law is reflected in legislation and in the decision of courts, while the portion founded in reason consists primarily in the application of widely accepted principles of good conduct to the specific problem of the military counsel. The general principles have been stated for the use of the individual not by society as a whole but by the minor group of society most conversant with the problems involved and the function regulated. For the legal profession these principles have taken the form of "Canons of Ethics" formulated by State and local Bar Associations and by the American Bar Association.[6] These standards, while promulgated by the minor group, must stand the appraisal and criticism of the public as any failure to conform or exceed the prevailing norms of society as a whole carries with it a loss of prestige for the entire minor group.[7]

With the guidelines furnished by the positive law and by the standards of the group as expressed in the various canons, ethical problems are eased but not solved as the duties owed by the professional legal person are many and often conflict. The duties of a lawyer have been listed thusly: 1st, to the State as an officer and citizen; 2d, to the Court as an officer and adviser; 3rd, to his client as a fiduciary; and 4th, to his brother lawyers. The lawyer cannot be honest to one duty and dishonest to another. His duties must be performed to all without infringing upon or impairing the rights of others and when he so performs his conduct is then con-

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[3] *Webster's New Collegiate Dictionary* (2d Ed., 1956).

[4] Crabb, *Crabb's English Synonymes* (1917).

[5] Boston, *The Source and Formulation of Ethical Precepts*, 78 Cent. L. J. 400 (1914).

[6] American Bar Association, *Canons of Professional Ethics* (1957) (hereinafter cited as Canon, ABA).

[7] Ross, *Social Control* (1901).

sidered ethical.[8] The duties of the military counsel are not materially different from the duties of his civilian counterpart.

The judicial system of which the military defense counsel is a part was effectuated in 1951 by the promulgation of the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States, 1951*.[9] While this system emanates from Congress' power to make "rules for the Government and regulation of the land and naval forces,"[10] rather than the judicial authority of the Constitution,[11] it is judicial in nature.[12] Although the system is said to be an instrument in the hands of the executive power for the regulation of the Armed Forces[13] there appears to have been a recent trend enhancing it with an increasing aura of judicial likeness.[14]

Whether the military justice system is truly judicial in nature or not is perhaps not the prime consideration as the system does encompass an arrangement whereby one person represents another, accused of crime, before a body empowered to punish. The very nature of the representation is sufficient to require a special standard of conduct on the part of the attorney.[15] The administration of military justice is conducted by lawyer and lay person alike, and yet, although the UCMJ[16] and the Manual[17] incorporate certain ethical principles, there has been no definitive body of standards enunciated similar to the canons of ethics instituted by other bars. Despite this, the requirements contained in the UCMJ and the

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[8] *Report of the Committee on Admissions of the New York County Lawyers Association*, Year Book, New York County Lawyers Association (1909).

[9] 10 U.S.C. 801–940 (1952 Ed., Supp. V), placed in force and effect by Executive Order 10214, dated February 8, 1951 (hereinafter referred to as the UCMJ or the Code). Its provisions are implemented by the *Manual for Courts-Martial, United States, 1951* (hereinafter referred to as the Manual).

[10] U.S. Const., art. I, sec. 8, cl. 14.

[11] U.S. Const., art. III.

[12] *Runkle* v. *U.S.*, 122 U.S. 543 (1887).

[13] *Ex parte Quirin*, 317 U.S. 1 (1942).

[14] Snedeker, *Military Justice Under The Uniform Code* 47 (1953).

[15] *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), wherein Chief Judge Cardozo said: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

[16] Arts. 6(c), 22(b), 26, 27, 32(b), 34, 37, 38, 42, 48, 51, and 64, UCMJ.

[17] Pars. 35, 38, 39, 40, 42, 43, 44, 45, 46, 47, and 48, MCM, 1951.

Manual, as well as the Canons of Professional Ethics of the American Bar Association, have been stringently applied to the conduct of military counsel by the Court of Military Appeals.[18] All military personnel who are lawyers remain subject to the ethical standards to which they subscribed in becoming a member of the civilian bar, regardless of their position or work in the military service.[19] The other judicial officers and counsel are guided only by the UCMJ and the Manual provisions as interpreted in cases decided by the Court of Military Appeals. These decisions are rarely available to non-lawyer special court-martial personnel. It has been stated that military tribunals probably never can be constituted in such a manner as to have the same kind of qualifications deemed essential to fair trials of civilians in federal courts.[20] However, the application of ethical principles to all persons in the military system makes the attainment of such a standard of justice very probable.

The ethical responsibilities of the military defense counsel must be considered in the light, not only of his personal ethical limitations, but also the protections afforded him and his client by the obligations on the others active in the system.[21] The principal persons whose ethical duties interrelate with the defense counsel are the Convening Authority, the Staff Judge Advocate, the Law Officer and the Trial Counsel.

It is the object of this article to examine and analyze the professional ethics which pertain to the military defense counsel, to compare in a limited manner civilian practice in the fields of conflicting

[18] *U.S.* v. *Turley*, 8 USCMA 262, 24 CMR 72 (1957). The Court stated at page 265 while discussing the attorney-client relationship: "[N]o court—either Federal or State—has been more zealous in safeguarding and strengthening the privilege arising therefrom than this Court. We need not look to the decisions of other courts for precedent—our own cases speak for themselves."

[19] *In re O'Neil*, 228 App. Div. 129, 239 N.Y. Supp. 297 (1st Dept., 1930).

[20] *U.S. ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955).

[21] *U.S.* v. *Williams*, 8 USCMA 328, 24 CMR 138 (1957). Wherein the Court stated at page 328: "It is incomprehensible to us how, at this late date, after the enactment of the Uniform Code of Military Justice, a record of trial containing such a plethora of errors as found in the instant case could have proceeded unscathed through the staff legal officer, the convening authority, and the board of review. Over five years ago in one of our early cases, we had occasion to remark that: 'It is not this Court alone that is endowed by Congress with responsibility for insuring that courts-martial are conducted in accordance with required procedures. The reforms intended by the Uniform Code of Military Justice will not be carried out until officers concerned with ordering, conducting and reviewing courts-martial observe scrupulously their duties and responsibilities under the Code and the Manual.' [United States v. James, 1 USCMA 379, 3 CMR 113]."

interests and appeals based upon inadequate representation, and to examine the need for additional emphasis on ethics among military counsel and judicial persons.

I. GENERAL ASPECTS

Matters of loyalty, duty, and adherence to established norms are not new to the military officer as these attributes are considered mandatory in a good leader, contribute materially to the stability of the military forces, and are indispensible requisites for success in battle.[22] Neither is the concept of fidelity to an accused completely new to the military defense counsel as references to the conduct and duties of counsel were contained in the Manuals for Courts-Martial previous to the current one.[23] With the ebb of the theory that courts-martial are executive instruments for the enforcement of discipline, and the concomitant ascendency of a judicial concept designed to insure a fair trial, these officers must, however, reweigh their loyalties and duties when appointed as counsel within the framework of a code of conduct found acceptable by the general public. It was the clamor of the public which required the enactment by Congress of the UCMJ, and it is they, the public, who must ultimately judge the administration of justice under it.[24]

The realization of the need for a Code of Ethics in civilian professional legal matters developed only recently from a historical viewpoint. The first Code of Ethics was adopted in Alabama in 1887. Later in 1908 the American Bar Association adopted its Canons of Professional Ethics which by 1914 had been assimilated by 31 state bars as their own.[25] Subsequently, in 1924 the American Bar Association adopted the Canons of Judicial Ethics.[26] These canons are not binding on attorneys and judges who are not members of the American Bar Association and may be enforced as to members only by suspension or expulsion from the Association. However, since all state bar associations have canons of ethics for lawyers and judges similar to those of the association and because the opinions of the Committee on Professional Ethics and Grievances of the Association are considered as authoritative by members of the legal profession, these latter canons will be

[22] Chapter XVI, *The Officer's Guide* (1951).
[23] Pars. 41, 42, 43, 44, 45, MCM, 1928; pars. 41, 42, 43, 44, MCM, 1949.
[24] Quinn, *The Court's Responsibility*, 6 *Vanderbilt Law Review* 161 (1953).
[25] Drinker, *Legal Ethics* 24–25 (1953).
[26] Foreword, American Bar Association, *Opinions of the Committee on* Professional Ethics and Grievances (1957).

applied throughout this article in considering the several aspects of the ethical problems raised in the military justice system.

The need for the formalization of the standards of conduct of professional legal persons is said by one writer[27] to have arisen because of a growing commercialism all over the country with a consequent weakening of an effective professional public opinion. He also stated that many lawyers departed from honorable standards of practice as a result of actual ignorance of the ethical requirements of a given situation. While the motivating background of the need for formalizing the standards of conduct for persons administering military justice may be different in that it springs primarily from the nature of the organization required by the military service and the previous military concept of the administration of justice, the result desired from such formalization is the same. This result is a fair trial, or fair representation if no trial is involved, based upon the law and the highest moral principles.

The duty of the lawyer is well expressed in Canon 32 which states:

> "No client, corporate or individual . . . however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold; or corruption of any person or persons exercising a public office or private trust or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interest of his client when he renders service or gives advice tending to impress upon his client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

The military lawyer prior to his specific appointment as a defense counsel for a named accused owes the foregoing quoted duties to the Government as he is in the employ of the military service concerned as an attorney performing legal services. He is available at all times to represent the United States in a criminal action. As his employment by the Government is a fulltime and service commitment, he is not free to accept another client until released from his primary obligation to the Government in some manner.

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[27] Drinker, *Legal Ethics* 25 (1953).

The problems surrounding the creation of an attorney-client relationship between an accused and the military defense counsel differ materially from those of civilian practice. Therefore, they will be considered in detail.

II. ESTABLISHMENT OF ATTORNEY-CLIENT RELATIONSHIP

A military accused has a right to counsel[28] but this right does not obligate the military to appoint a counsel for him prior to the filing of charges.[29] No specific language is found in the Code or the Manual relative to the appointment of counsel for an accused after charges have been preferred[30] until such time as the charges have been processed and actually indorsed to an officer designated to perform the investigation required by Article 32, UCMJ, 1950.[31] The Court of Military Appeals has, however, in several cases indicated that a right to military counsel may exist.[32] It has been clearly established that even prior to charges a suspected person has a right to consult a civilian attorney during interrogation by government agents[33] or to seek advice from the Staff Judge Advocate.[34] The extent of such advice from the Staff Judge Advocate, who has been compared with a civilian district attorney[35] is very limited as any action by him which established a privileged relationship between him and the suspect, might well be construed as creating a conflict of interest between his duties as a government lawyer and those to the accused sufficient to preclude his further action on the case as Staff Judge Advocate.[36] Further, he

[28] *U.S.* v. *Clay*, 1 USCMA 74, 1 CMR 74 (1951).

[29] *U.S.* v. *Moore*, 4 USCMA 482, 16 CMR 56 (1954). See also *U.S.* v. *Carignan*, 342 U.S. 36 (1951); *Commonwealth* v. *McNeil*, 328 Mass. 436, 104 N.E.2d 153 (1952); *State* v. *Bunk*, 4 N.J. 461, 73 A.2d 249 (1950).

[30] An exception is found in the situation where it is desired to take a deposition before charges are referred for trial; see par. 117, MCM, 1951; Art. 49. UCMJ.

[31] Art. 32(b), UCMJ, states in part, ". . . he shall be represented . . . by counsel appointed by the officer exercising general court-martial jurisdiction over the command."

[32] *U.S.* v. *Moore*, 4 USCMA 482, 16 CMR 56 (1954); *U.S.* v. *Hounshell*, 7 USCMA 3, 21 CMR 129 (1956); *U.S.* v. *Gunnels*, 8 USCMA 130, 23 CMR 354 (1957).

[33] *U.S.* v. *Rose*, 8 USCMA 441, 24 CMR 251 (1957), held, where suspects' request to consult attorney was denied, subsequently obtained statement was inadmissible in evidence; but see *U.S.* v. *Melville*, 8 USCMA 597, 25 CMR 101 (1958).

[34] *U.S.* v. *Gunnels*, 8 USCMA 130, 23 CMR 354 (1957).

[35] *U.S.* v. *Hayes*, 7 USCMA 477, 22 CMR 267 (1957).

[36] Art. 6(c), UCMJ.

must exercise the greatest care in a conversation with such suspect as Canon 9[37] reads in part:

> ". . . . It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Probably the extent of advice by the Staff Judge Advocate would be to tell the suspect that he has a right to obtain civilian counsel at his own expense. Thus, it may be seen that the lawyer who is subsequently appointed to represent an accused has an assurance that government attorneys have not misled an accused if they have acted ethically in the case prior to the time the Government furnishes counsel for the accused.

Generally in civilian practice a lawyer upon his own responsibility must decide what employment he will accept.[38] This is true to a great extent even where the public defender system has been instituted, as that person determines whether the accused requesting the services meets the statutory criteria so as to qualify[39] for public defender representation. A civilian public defender does not usually have the problems of the military lawyer incident to the creation of a status from which an attorney-client relationship might properly ripen. For example, in California the Public Defender is elected to the office for a term of four years,[40] which office has been judicially determined not to be a county office representing the state in criminal actions.[41]

Unlike the Public Defender the military lawyer suffers from the same disabilities as the Staff Judge Advocate in that he is a full-time attorney for the state[42] and is available to represent it in criminal actions. The military lawyer's status as a defense counsel is created and may be terminated[43] by the court-martial convening authority almost at will. The only available authority for a judge advocate officer to render legal service to a member of the military service, other than by appointment as a defense counsel

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[37] Canon 9, ABA.
[38] Canon 31, ABA.
[39] Cal. Code Ann., Tit. 3, §27706 (1947). (The court may also appoint counsel under this system.)
[40] Cal. Code Ann., Tit. 3, §27704 (1947).
[41] *Ex parte Hough*, 24 Cal. 522, 150 P.2d 448 (1944).
[42] Arts. 6(a), 27, 32(b), 38(b), UCMJ; pars. 34*c*, 46*d*, 48, MCM, 1951.
[43] Par. 6, SR 22–130–5, 26 Mar 1951: In a dissenting opinion in *U.S.* v. *Frye*, 8 USCMA 137, 23 CMR 361 (1957), Judge Ferguson stated he would not visit the sins of defense counsel on the accused because accused has little or no control over the selection of counsel appointed and none over the termination of his status (here defense counsel was shipped back to ZI).

under Article 27 of the Code, is the legal assistance regulation.[44] While the Court of Military Appeals in the dictum of the Gunnels[45] case stated that the regulation applied only to legal assistance officers, the clear text of the regulation appears to be applicable to all judge advocate officers in that it states in pertinent part:

> "1. General.—a. Purpose.—Military personnel . . . frequently need legal advice and assistance concerning their personal legal problems. . . .
>
> "b. Activity of Judge Advocate General's Corps.—Within the Army, the rendering of legal advice and assistance to military personnel . . . concerning personal *legal* problems is a professional service of The Judge Advocate General and his corps. . . . The term[s] 'legal assistance officer' . . . include[s] and [is] . . . applicable to all judge advocates and their offices when engaged in rendering legal assistance. . . .
>
> "10. Confidential and privileged character of service provided and limitations thereon.—a. Inasmuch as the service provided hereunder is essentially legal, the usual attorney and client relationship must be maintained by all concerned. . . .
>
> "b. Service will *not* be provided hereunder to advise or assist military personnel in any case in which such personnel are or probably will be the subject of court-martial investigation or charges. Military personnel will not consult legal assistance officers concerning such matters, and *such officers will refuse to receive confidences from them unless authorized by competent orders to defend them pursuant to the Uniform Code of Military Justice.* Articles 6 or 27. . . ." [Emphasis supplied.]

From the foregoing it is concluded that the military lawyer, including a Staff Judge Advocate, may not ethically enter into an attorney-client relationship with a military *accused* except after having been appointed a defense counsel under the authority of the Code. There is no requirement that the appointment as counsel for an accused be made in a particular manner. It may occur quite informally or it may be accomplished formally by the promulgation of a written order. It normally takes the form of an informal designation of a person by name to represent a specific accused or as the result of formal charges involving an accused being refered for trial to a court-martial, of which a person has previously been appointed the defense counsel.

In spite of the validity of the above conclusion, occasionally confidences may be extended to an attorney under conditions so as to cause the attorney-client relationship to arise by operation of law. If such a relationship is established, the attorney-client privilege is extended to the communications and the relationship creates a conflict of interest problem for the attorney involved.[46]

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[44] AR 600–103, 29 Jun 1951.

[45] *U.S.* v. *Gunnels*, 8 USCMA 130, 23 CMR 354 (1957).

[46] *U.S.* v. *McCluskey*, 6 USCMA 545, 20 CMR 261 (1955); *U.S.* v. *Green*, 5 USCMA 610, 18 CMR 234 (1955); Opinion 216, American Bar Association, *Opinions of the Committee on Professional Ethics and Grievances* (1957) (hereinafter cited as Opinion, ABA).

The Court of Military Appeals has in at least two cases[47] noted that the record of trial indicated activity by counsel for an accused prior to the date of the formal order of appointment of a defense counsel. In the Parker case, government counsel urged the court to judicially notice that such activity prior to the formal order was a standard practice. The court declined to do so. These cases may not be construed as approving gratuitous representation by the officers concerned as there is no indication that the convening authority had not informally made the officers available to the accused as counsel within the framework of the Code.

The Code provides specific authority for counsel to be appointed to represent an accused prior to referral of the charges to a court-martial for trial on two occasions. These are for the taking of a deposition after charges have been preferred and prior to referral[48] and if the accused requests counsel at the pretrial investigation.[49] The language of the Code appears to restrict these appointments to the taking of the deposition and the formal investigation only. However, once an attorney and client relationship has arisen the activities and duties of the attorney are governed by the same principles[50] and ethical considerations as a civilian attorney. The Manual[51] describes his duty, in part, as follows:

> "An officer or other military person acting as counsel for the accused . . . will perform such duties as usually devolve upon the counsel for a defendant before a civil court in a criminal case. . . ."

Thus, his obligations extend beyond the limits of the investigation proper or the taking of the deposition and continue until other counsel has been appointed, or the case has been referred for trial or dismissed. Any other contention would deprive the accused of counsel before the judicial forum which actually renders the pretrial decision[52] as the recommendation of the Investigating Officer is advisory only.[53] However, the status of attorney and

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[47] *U.S.* v. *Parker*, 6 USCMA 75, 19 CMR 201 (1955); *U.S.* v. *McMahan*, 6 USCMA 709, 21 CMR 31 (1956).

[48] Art. 49(a), UCMJ; par. 117, MCM, 1951. "[S]uch an authority may designate officers . . . to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness."

[49] Art. 32(b), UCMJ. "The accused shall be advised of the charges against him and of his right to be *represented at such investigation by counsel.*" (Emphasis supplied.)

[50] Par. 34*c*, MCM, 1951; *U.S.* v. *Brady*, 8 USCMA 456, 24 CMR 266 (1957); *U.S.* v. *Tomaszewski*, 8 USCMA 266, 24 CMR 76 (1957).

[51] Par. 48*c*, MCM, 1951.

[52] Art. 34, UCMJ.

[53] Par. 34*a*, MCM, 1951.

client may be terminated by the appointing authority at any time.[54]

The mere appointment of an officer as a defense counsel for an accused either under the previously discussed Code provisions or under Article 27, UCMJ, does not of itself create the attorney-client relationship.[55] One writer has said[56] that the commencement of the professional relationship is ". . . the result of a desire on the part of the client to employ an attorney in and about his business or litigation, and of a corresponding consent on the part of the attorney to act for the client in a professional capacity. . . .

The establishment of the relationship is in no way dependent upon the payment of a fee and may exist between two parties even though a third party pays the fee or the services are given gratuitously.[57] The actual creation of the relationship is usually implied from the acts of the parties.[58] The acts must show consent on the part of the accused to the relationship.

The ethical obligations and limitations are the same for a defense counsel at any stage of the court-martial proceeding. However, as problems occur more frequently after a case has been referred for trial these matters will be discussed from that viewpoint.

III. ETHICS PRIOR TO TRIAL

In discussing the ethical problems of the trial attorney, it has been said that three different ethical standards may be applied, namely: first, the ideal of the best men in the profession; second, the actual practice of the man of ordinary ethical prudence; and third, the standards applied by the courts in disciplinary proceedings. In other words, the standards are (1) the hope of the profession; (2) its practice, which, unfortunately, does not always measure up to hope; and (3) what will "get by" the courts.[59] Further, courts, and other members of the profession must allow a large latitude to the individual judgment of counsel in determining his actions within the standard,[60] as the basic integrity of the lawyer is the corner stone upon which a judicial system must rest.[61]

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[54] *U.S.* v. *Frye*, 8 USCMA 137, 23 CMR 361 (1957); *U.S.* v. *Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954).
[55] *U.S.* v. *Nichols*, 8 USCMA 119, 23 CMR 343 (1957); *U.S.* v. *Miller*, 7 USCMA 23, 21 CMR 149 (1956).
[56] Weeks, *Attorneys at Law*, §183 (2d Ed. 1892).
[57] *Keenan* v. *Scott*, 64 W.Va. 137, 61 S.E. 806 (1908).
[58] *U.S.* v. *Brady*, 8 USCMA 456, 24 CMR 266 (1957).
[59] Hewitt, Book Review, 35 *Yale Law Journal* 391 (1926).
[60] *Commonwealth* v. *Hill*, 185 Pa. 387, 39 Atl. 1055 (1898).
[61] Opinion 25, ABA; Canon 30, ABA.

An officer or other military person acting as counsel for the accused before a general or special court-martial must perform the duties which devolve upon counsel for a defendant before a civil court in a criminal case.[62] In addition, many of the pretrial duties have in essence been made directive in nature by the Manual for Courts-Martial, which requires that counsel will advise the accused of and explain his right to have enlisted persons on the court,[63] the meaning and effect of a plea of guilty, his testimonial right, both before and after findings, and his right to assert any proper defense or objection.[64]

The period in military criminal proceedings between referral of charges and the actual trial may be compared favorably to the time in civil criminal proceedings between arraignment and trial. The Supreme Court of the United States has stated concerning this period; "... that during perhaps the most critical period of the proceedings against these defendants, that is to say, from time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."[65]

While the totality of ethical standards are applicable to the pretrial conduct of counsel, some aspects are more pertinent at this state than at later proceedings. The counsel must use his best efforts to obtain a full and complete knowledge of the accused's cause, both facts and law, and then advise him candidly of the merits of his case and the probable result of the trial.[66] Although most accused would be better pleased with having his views confirmed by an erroneous opinion than his hopes and wishes thwarted by a sound one, such assentation would be dishonest and unprofessional.[67] The attorney is bound to tell the client his real opinion and to advise him to do what he honestly believes is in his best

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[62] Par. 48*c*, MCM, 1951. No attempt will be made to differentiate between appointed counsel, selected individual military counsel, or civilian counsel unless the Court of Military Appeals has in a particular instance indicated that the type of counsel involved influenced a decision. The ethical standard to be applied to the conduct of counsel does not vary with the source of the counsel but the imputation to the accused of acts of counsel may be affected by the amount of control he was able to exercise over selection of counsel.

[63] Par. 48*e*, MCM, 1951.

[64] Par. 48*f*, MCM, 1951.

[65] *Powell* v. *State of Alabama*, 287 U.S. 45 (1932).

[66] Canon 8, ABA; para. 44*f*(4), 48*f*, MCM, 1951.

[67] Hoffman, *A Course of Legal Study* 764 (2d Ed., 1836).

interest.[68] He should beware of bold assurances as occasionally the evidence may later surprise or disappoint him and cause a result opposite to his original evaluation.

It is during the pretrial period that any conflicting interests on the part of counsel should become known and revealed in detail to the accused so that he may intelligently exercise his right to request other counsel.[69] Canon 6 states in part: "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." The effect of the representation of conflicting interest will be discussed subsequently.

During the pretrial investigations and consultations the military defense counsel may, on occasion, become convinced that his client is completely guilty and yet he is duty bound to represent the individual by all honorable and legitimate means regardless of his personal opinion.[70] This is not identical with civilian practice, although the first paragraph of Canon 5 is as follows:

> "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

This Canon has been construed as a right of the attorney to refuse to represent a client of whose guilt he becomes convinced but to in no way bind him to refuse on such a basis. It has been stated that "our legal system does not constitute the lawyer the judge as to the justice or soundness of the causes committed to him, but deems it in the ends of justice to have all the facts and arguments on each side of the controversy presented by expert counsel, stimulated to a maximum of industry and ingenuity by the contest, for decision by the court and jury."[71] Indeed, it has been held both that a personal belief in the soundness of a cause or of the authorities supporting it is irrelevant[72] and that an attorney who makes a practice of withdrawing from the defense of an accused when he becomes convinced of his guilt should so inform the client prior to receiving any confidences.[73]

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[68] Opinion 82, ABA.
[69] Par. 48*c*, MCM, 1951.
[70] *Ibid.*
[71] Drinker, *Legal Ethics* 142 (1953).
[72] Opinion 280, ABA.
[73] Opinion 90, ABA.

The principal ethical problems during the pretrial proceedings seem to lie in the fields of gathering evidence, relations with the opposing counsel and pretrial agreements with the convening authority relative to pleas.

These problems will be considered in the order stated.

A. *Investigation*

Counsel should make an exhaustive investigation of all possible sources of evidence including personal interviews with all witnesses. The investigative effort must be designed not only to furnish a basis for affirmative defenses but also to ferret out possible weaknesses in the Government's case. The investigation by counsel must be conducted within the limitations of ethical conduct. With regard to the discovery of evidence, the Manual provides that counsel ". . . in interviewing a witness . . . should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial."[74] Although the Manual appears to forbid only action which might cause a deviation from the truth *at the trial* (emphasis supplied), it would seem that actions by counsel which might induce a witness to pretrial statements or actions designed to mislead opposing counsel would not be within the "fair and honorable" means or candid conduct allowed by the canons of ethics. The Manual also provides that: ". . . [P]rior to trial, he [Trial Counsel] should advise the defense of the probable witnesses to be called by the prosecution. . . ."[75] Although this passage requires the Government to furnish the defense a list of probable witnesses, there is no corresponding duty upon the defense counsel. Indeed there is a substantial difference between the duties of government counsel and defense counsel with regard to evidence which their respective investigations may have revealed. The second paragraph of Canon 5, relative to the duty of public prosecutors states:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

While the trial counsel need not call an eye witness to a crime whose testimony he believes to be unreliable, he must advise the defense of the existence of the witness.[76] The defense, on the other hand, need not in any way expose to opposing counsel the results

[74] Par. 42*c*, MCM, 1951.
[75] Par. 44*h*, MCM, 1951.
[76] *Commonwealth* v. *Palermo*, 368 Pa. 28, 81 A.2d 540 (1951).

of his investigation unless the services of the Government's subpoena power or other assistance in obtaining a witness is desired.[77]

B. *Relations With Counsel*

The relations between the lawyers involved with the pretrial matters, e.g., the defense counsel, trial counsel, and Staff Judge Advocate, must be characterized by candor and fairness.[78] It may never be forgotten that the clients, not the lawyers, are the litigants. Even in cases where there may be ill feelings between clients or perhaps some unrealistic viewpoint on the part of some section of the Government, these matters should not influence lawyers in their conduct or demeanor toward each other.[79] Attorneys must "do as adversaries do in law: strive mightily but eat and drink as friends."[80]

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel but rather must communicate with and through the party's counsel. Consequently, the trial counsel must conduct all matters concerning an accused through the defense counsel,[81] as should the Staff Judge Advocate. It has also been established that it probably would be improper for an attorney for the Government to permit police officers or detectives to interview an accused without the knowledge of his attorney.[82] The attorney may not advise or sanction acts by his client which he himself should not do.[83]

The defense counsel is as obligated by Canon 9, which regulates negotiations with the opposite party, as is counsel for the government. He must exercise caution especially when there are several accused each of whom are represented by other counsel. He may not properly interview one of these accused, unless his counsel is present, even though the accused is an anticipated witness against the defense counsel's client.

Both the defense counsel and the trial counsel experience some difficulty when dealing with the convening authority. This occurs because the Code and the Manual fail to clearly delineate the functions of the Staff Judge Advocate and the Trial Counsel in so far as they relate to the Convening Authority. Are either of these government lawyers the attorney for the Convening Authority so as to ethically require other attorneys in a case to communi-

[77] Pars. 44*f*(2), 115, MCM, 1951.
[78] Canon 22, ABA.
[79] Canon 17, ABA.
[80] Shakespeare, *Taming of the Shrew*, Act I, end of Scene 2.
[81] Par. 44*h*, MCM, 1951; Canon 9, ABA.
[82] Opinion 95, ABA.
[83] Opinion 75, ABA.

cate through them? For example: A defense counsel feels he cannot properly represent an accused because of a deep hostility toward him. A report of this is required "to the convening authority for his appropriate action."[84] Should this be directed through the trial counsel or the Staff Judge Advocate or either? As to the Trial Counsel, he is required to report to the Convening Authority when he discovers that there "has not been a substantial compliance with Article 32."[85] Must he route this report through the Staff Judge Advocate? These and similar questions are not susceptible of truly definitive answers. It appears that Canon 25 in holding the attorney to the known customs or practices of the Bar of a particular court may well require different solutions in the numerous jurisdictions which exist throughout the world in the military service. The military lawyer should familiarize himself with these practices and adhere to them.

C. *Pretrial Agreements*

During recent years, there has arisen in the military justice system a practice commonly referred to as a pretrial agreement whereby the accused through his counsel agrees to plead guilty in return for certain benefits promised by the convening authority.[86] These benefits normally take the form of reducing the charge to some lesser offense, dismissing some of the charges, or agreeing to approve no greater sentence than that contained in the agreement. This practice contains possible evils from which an accused and his counsel are protected only by the ethics of government legal personnel and the convening authority. While the ultimate decision as to what charges to refer to trial and what proposed pretrial agreement should be accepted lie with the convening authority, as a discretionary and judicial function which he may not delegate,[87] he must of necessity lean heavily upon the Staff Judge Advocate both for the general policies governing these affairs and the specific disposition of individual cases. The possible evils lie in that area of the pretrial proceedings where it is permissive to multiply the charges arising out of a single transaction, to charge minor offenses with serious ones,[88] and the decision as to whether the trial of an offense in the most serious aspect

[84] Par. 46*b*, MCM, 1951.
[85] Par. 44*f*(5), MCM, 1951. Under the decision in *U.S.* v. *Olson*, 7 USCMA 242, 22 CMR 32 (1956), it is clear that at the trial the trial counsel represents the United States and not the convening authority but his pretrial function is not always so clear.
[86] JAGJ 1953/1278, 23 Apr 1953.
[87] *U.S.* v. *Brady*, 8 USCMA 456, 24 CMR 266 (1957).
[88] Par. 26*b* and *c*, MCM, 1951.

is warranted by the available facts.[89] Should the government attorneys or the Convening Authority be in any way, even subconsciously, influenced to decide these matters adversely to an accused for the purpose of enhancing the Government's position relative to a possible pretrial agreement, then their conduct could not be considered ethical even though the resulting record of trial received the affirmation of appellate bodies.[90] Government counsel find their guidance and the defense finds it protection in the canons of ethics. Pertinently the following extracts of the canons should be observed:

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. . . ."[91]

". . . . He [a lawyer] is bound to give a candid opinion of the merits and probable result of pending or contemplated litigations. . . ."[92]

". . . . The office of Attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of this client."[93]

". . . . The client cannot be made the keeper of the lawyer's conscience in professional matters. . . ."[94]

"It is unprofessional and dishonorable to deal other than candidly with the facts . . . in the presentation of causes."[95]

". . . .He [the lawyer] should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."[96]

". . . . The responsibility for advising as to questionable transactions, for bringing questionable suits . . . is the laywer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."[97]

". . . . Nor should any lawyer render any service or advice involving disloyalty to the law . . . or corruption of any person or persons exercising a public office . . . or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. . . ."[98]

"When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon . . . a party, he should endeavor to rectify . . . ."[99]

As the area of conduct here considered is for the most part such as will usually meet the minimum legal requirements of the sys-

[89] Par. 35, MCM, 1951; Opinion 129, Michigan Bar Association.
[90] CM 398131, *Lemieux*, 10 Dec 1957; CM 397822, *Wille*, 10 Dec 1957.
[91] Canon 5, ABA.
[92] Canon 8, ABA.
[93] Canon 15, ABA.
[94] Canon 18, ABA.
[95] Canon 22, ABA.
[96] Canon 29, ABA.
[97] Canon 31, ABA.
[98] Canon 32, ABA.
[99] Canon 41, ABA.

tem, the defense's total protection from abuse is in the conscience of the public officer and his proper application of the above ethical pronouncements. An area which is more readily subject to judicial scrutiny is commonly termed "command influence" and has been well analyzed and discussed elsewhere.[100]

Although compromise and settlement are more usually considered relative to civil suits, they are not improper in criminal cases. While an "accused has a legal and moral right to enter a plea of not guilty even if he knows he is guilty,"[101] much benefit may often be gained by an accused through the use of the pretrial agreement in return for a plea of guilty. Sharswood has said:

> "A very important part of the advocate's duty is to moderate the passions of the party, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy. . . ."[102]

An inclination or attempt to compromise does not mean that there should be any delay in the preparation of the case of tepidness in advocacy. The successful completion of such pretrial arrangements may well rest upon the adequacy of the preparation.[103] Regardless of the counsel's opinion as to the desirability of an agreement with the convening authority followed by a plea of guilty, he must leave the decision as to whether such a compromise shall be suggested up to the accused after fully advising him of all of the possible consequences of the alternative courses of action. If the accused desires, it is the obligation of the attorney, by "all fair and honorable means, to present every defense that the law of the land permits."[104] Included within the problem of a pretrial compromise is the extent to which the defense case shall be displayed to the Government for the purpose of demonstrating the advantages of such a compromise to the Government. When the matter to be revealed by counsel includes disclosures of confidential communications, counsel must exercise great care. The pretrial disclosure to government representatives of either matters in defense of the allegations or in mitigation and extenuation are not privileged and, if no compromise is effected, may be used to the disadvantage of the accused. Counsel should fully inform his client of the matters intended for presentation and obtain his unqualified consent prior to any disclosure.[105]

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[100] See Cutler, *Command Control Versus Command Responsibility* (unpublished thesis in The Judge Advocate General's School, U. S. Army, 1957).

[101] Par. 70*a*, MCM, 1951.

[102] Sharswood, *An Essay on Professional Ethics* 109 (6th Ed., 1930).

[103] Cheatham, *The Legal Profession* 203 (1938).

[104] Canon 5, ABA.

[105] Canon 37, ABA; Opinion 47, ABA; JAGJ 1953/3863, 9 Jun 1953.

IV. ETHICS DURING THE TRIAL

A. *Conflicting Interests*

". . . . No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution."[106]

Congress through the foregoing law adopted for the military justice system the civilian precept to the effect that a lawyer may not represent conflicting interests.[107] This precept is succinctly stated in the last two paragraphs of Canon 6, American Bar Association, which provide:

"It is unprofessional to represent conflicting interest, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

It should be noted at the outset of a consideration of this topic that "it would be a credit [to] the legal profession if all attorneys avoided the appearance of evil, but failure to meet ethical matters only affects guilt or innocence or a fair trial in a few instances. . . .[108] Therefore, only the most patent and flagrant breaches of ethics reach the level of adjudication. From the cases can be determined only the extent to which an attorney may, under the law, represent a conflicting interest without being guilty of having violated a confidence or prejudiced his client by failing to represent him fully.

It has been stated[109] that the above quoted portion of Canon 6 covers two distinct obligations:

"First, not to represent conflicting interests except with the deliberate consent of all concerned.

"Second, not to disclose or abuse professional confidence."

This Canon remains today in the original form as adopted in 1908. However, that portion dealing with divulging a client's confidence was enlarged and broadened in 1928 by the adoption of

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[106] Art. 27(a), UCMJ. Also see: "No man can serve two masters; for either he will hate the one, and love the other; or else, he will hold to the one and despise the other. Ye cannot serve God and Mammon." St. Matthew 6(24), *Holy Bible.*

[107] *U.S.* v. *Stringer,* 4 USCMA 494, 16 CMR 68 (1954).

[108] Judge Latimer speaking in dissent in *U.S.* v. *Thornton,* 8 USCMA 57, 23 CMR 281 (1957).

[109] Drinker, *Legal Ethics,* 104 (1953).

Canon 37 and again in 1937 when Canon 37 was amended.[110] This has caused some overemphasis on this phase of Canon 6 and although the disclosure of a confidential communication is one of the probable consequences of representing conflicting interests and is a very sound reason for prohibiting such representation, it is not the sole test for determining if interests in fact conflict. The Canon covers not only cases in which a confidence has been reposed but also those in which the lawyer assumes to represent parties having adverse interests with neither of whom he has had any previous dealings, much less confidential communications.

While the Canon contains the words "except by consent of all concerned" this exception is not available in a case where a public officer is involved.[111] This is recognized and codified in part by the previously quoted portion of Article 27*a*, UCMJ, which prohibits subsequent representation as opposing counsel after having acted either as Trial Counsel or Defense Counsel in the same case. No provision is made for the consent of the parties to such representation, it is simply a complete prohibition.[112] The limitation of the prohibition to representation "in the same case" only is necessitated in the military services by constant shifting of personnel both geographically and as to the position in which they may effectively be employed. Conversely, the civilian public officer usually has a relatively long tenure of office and is prohibited from representing an interest which appears to conflict with his duties to the public as to all cases on the grounds that to act in such a manner would put him in an unseemly situation, likely to destroy public confidence in him as a public officer and bring reproach to his profession,[113] and certainly he may not act for an individual where he has in any way participated in the same matter for the public.[114]

While court decisions relative to representing conflicting interest are determinative only of the lowest limit of ethical conduct rather than a desired standard of such conduct, these decisions do indicate situations which the military counsel should avoid. In apply-

[110] Foreword, American Bar Association, *Opinions of the Committee on Professional Ethics and Grievances* (1957).

[111] Opinions 16, 34, 77, 186, ABA.

[112] Par. 6*a*, MCM, 1951, strengthens this prohibition by supplying a presumption that a person appointed as counsel subsequent to the referral of the charges has acted in the capacity unless facts to the contrary are placed in the record of trial; ACM 5329, *Mace*, 5 CMR 610 (1952); ACM 4807, *Blair*, 5 CMR 454 (1952); where accused expressly request counsel who had previously acted as trial counsel, it is error but not a jurisdictional defect, ACM 11107, *Bell*, 20 CMR 804 (1955).

[113] Opinions 30, 186, ABA.

[114] Opinions 39, 55, 77, 83, 104, 118, 134, 135, 136, ABA.

ing the phrase "in the same case" contained in Article 27, military appellant agencies have repeatedly denounced duality of representation where the counsel concerned had previously represented a co-accused or an accomplice on the same charges but they have been reluctant to proceed beyond this point.

Ethical problems arise most often, however, not with regard to being appointed as counsel for an opposing party subsequent to representation of a side to a controversy, but rather, relative to adverse or conflicting interest among two or several clients or prospective clients on the same side. The Uniform Code of Military Justice does not specifically provide for this contingency but the Manual for Courts-Martial, 1951, does. It provides specifically that a defense counsel when appointed to represent an accused will "disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel" and if designated to defend two or more accused he should "advise them of any conflicting interest in the conduct of their defense which would, in his opinion, warrant a request on the part of any of the accused for other counsel."[115] In observing this injunction, counsel must have in mind not only avoiding a relation which will obviously involve the duty to contend for one client that which it is his duty to oppose for another client, but also the possibility that such a situation will develop. While there are cases in which it may be highly desirable for one counsel, with the consent of all parties, to represent them all, these cases are infrequent and are never entirely free from the danger of conflicting duties.[116] It is wiser for an attorney not to allow himself to be put in the position of representing conflicting interest or of being subject to a chance of betraying a professional confidence. Should counsel not exercise the care required by the circumstances for some reason, he may well find both himself and his client in an embarrassing position.[117]

A procedure is provided in the Manual whereby the defense counsel may make a report to the convening authority for appropriate action of any reason why he is unable to perform the duty assigned

[115] Par. 48*c*, MCM, 1951.

[116] Opinions 102,224,235,243,ABA; *Eiseman v. Hazard*, 218 N.Y. 155 (1916); CM 363087, *Self*, 13 CMR 227 (1953), wherein at page 237 with regard to specifications of absence without leave and larceny, the court stated: "No inconsistency in defenses or divergence of interest as between the several accused is indicated insofar as these offenses were concerned." Holding was reversed on the facts but the principle was reaffirmed on appeal reported as *U.S.* v. *Best*, 6 USCMA 39, 19 CMR 165 (1955).

[117] *U.S.* v. *Borner*, 3 USCMA 313, 12 CMR 69 (1953).

him in any case.[118] Although conflicting duties of the nature discussed here are not specifically enumerated as a reason for inability to perform, they must be included by fair implication.

In military jurisprudence, there may be detected an ever increasing concern for protecting not only the accused person in his absolute right to counsel's assistance, untrammeled by a divided fidelity, but also concern for trial defense counsel who are required over their timely protest to represent conflicting interest. The Court of Military Appeals early in its operation under the Code indicated that it intended to adopt the test of improper dual representation set out in the Glasser case where counsel was representing joint accused.[119] In the Glasser case, the Supreme Court at pages 75–76 said:

> "Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> "To determine the precise degree of prejudice sustained by Glasser as a result of the courts appointment of . . . [Glasser's lawyer] as counsel for . . . [another accused] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Court also said that the Court had a duty to refrain from even suggesting that counsel represent conflicting interests when another accused] had not been made."

The Court also said that the court had a duty to refrain from even suggesting that counsel represent conflicting interest when the possibility of a divergence of interest was brought home to it. Thus, it appears that the test to be applied in determining whether an accused will be denied effective assistance of counsel would be (1) the court's attention directed to the possibility of a divergence of interest, (2) the non-waiver by an accused of his right to undivided fidelity of counsels and (3) whether actual multiple representation would be less effective than it would have been had counsel been representing only one accused. It should be noted that in applying this test waivers should not be lightly accepted and should amount to an intentional relinquishment or abandonment of the right.[120]

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[118] Par. 46*b*, MCM, 1951.

[119] *U.S.* v. *Evans*, 1 USCMA 541, 4 CMR 133 (1952); *Glasser* v. *U.S.*, 315 U.S. 60 (1942).

[120] *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *U.S.* v. *Clay*, 1 USCMA 74, 1 CMR 74 (1951).

In applying the above test in the Evans case however, it appeared from the language used by the author judge that the divergence of interest required with regard to the appointment of additional counsel was roughly equated to that required to sustain a motion for a severance. He stated at page 137 that "the interrelationship of the right to separate counsel and the right to separate trials [is clearly indicated]. Both may depend on the possibility of a divergence of interest . . . among accused. No reasonable possibility of such a divergence was 'brought home to the court' here."

This conception of the matter, whether the language is properly interpreted or not, did considerable disservice to the obvious rule of the Glasser case. Separate trials are matters of privilege with a burden on the moving party of showing good cause,[121] while the effective assistance of counsel is a right which may not be abridged if the possibility exists that because of the additional burden of other accused, counsel may not effectively discharge his duty. An Army Board of Review pointed this out strongly in the Self case,[122] where although the denial of the motion for a severance was not considered an abuse of discretion by the Law Officer, his failure to provide separate counsel for the accused on a charge of murder was an abuse of discretion.

It should be noted here, as it has been noted previously, that from an ethical viewpoint the court decisions may be used only to determine the lowest limit of ethical conduct that wil "get by" a court and not an average or desirable standard of conduct. This is so because the court must find demonstrable prejudice to an accused arising out of the conflict of interest. The effect of the divergence of interest is often apparent only to the counsel involved who is fully cognizant of all tactical possibilities and who, therefore, must be the person to properly resolve problems of divided loyalty.

Recently the Court of Military Appeals has again considered the problem of conflicting interests.[123] These cases, though separate, involved representing two persons accused of crimes arising out

[121] Par. 69*a*, MCM, 1951.

[122] CM 363087, *Self*, 13 CMR 227 (1953); *U.S.* v. *Best*, 6 USCMA 39, 19 CMR 165 (1955).

[123] *U.S. v. Eskridge*, 8 USCMA 261, 24 CMR 71 (1957); *U.S.* v. *Lovett*, 7 USCMA 704, 23 CMR 168 (1957), where defense counsel represented coactors at separate trials. For the first accused he secured a pretrial agreement with the convening authority and accused pleaded guilty. Subsequently this accused appears as a chief witness against the second accused. The court in finding a denial of the right to counsel stated that the mere fact that a defense counsel had previously represented a person who later became a government witness against his client did not

of substantially the same transaction where the first accused represented became a witness against the second accused. The ethical principles involved are identical with those governing a joint trial. The court applied the basic principles enunciated in the Glasser case and restated the test to be applied in determining whether the dual representation had produced ineffectiveness of counsel thusly:

> ". . . [T]he test is not whether counsel could have done more . . . but whether he did less as a result of his former participation. We have often said that the interest of justice require that the appearance of evil should be avoided as well as the evil itself."[124]

The areas of caution set out in the laws, regulations and canons are not limited to dual representation in the same case, or in the same forum nor even relative to the same matter. This is principally because of the protection afforded an accused by the continuing nature of the attorney-client privilege. Even where the attorney fails to realize that an attorney-client relationship existed, information obtained in confidence may create a conflict of interest in a later criminal proceeding where the attorney represents the Government against his former client.[125] This is also true even though the attorney may have improperly, from an ethical viewpoint, allowed an attorney-client relationship to arise[126] as the existence of the attorney-client privilege is a legal rather than an ethical question.[127]

In the military service, military counsel are appointed to represent accused in every case, other than for a summary court, and the opportunity for an accused to obtain personally chosen counsel is substantially lessened by the locale of military installations and other circumstances. Consequently, the obligation to insure an accused effective assistance of a counsel whose loyalties are undivided lies not alone upon the appointed counsel, but also upon

[124] *U.S.* v. *Thornton*, 8 USCMA 57, 23 CMR 281, 285 (1957).

[125] *U.S.* v. *Turley*, 8 USCMA 262, 24 CMR 72 (1957)—Trial counsel used information he had gained some months previously from accused, while informally advising him relative to a board proceeding, to decrease accused's credibility through cross-examination.

[126] *U.S.* v. *McCluskey*, 6 USCMA 545, 20 CMR 261 (1955).

[127] Opinion 247, ABA.

in itself justify a conclusion of lack of effective assistance of counsel. However, the extent of the court's inquiry here amounted to no more than judicially noticing the first accused's record of trial; similarly in *U.S.* v. *Thornton*, 8 USCMA 57, 23 CMR 281 (1957), wherein defense counsel had represented accused number one at a trial for the larceny of an item and subsequently number two for unlawfully purchasing the stolen item. Accused number one was a government witness at the trial of accused number two.

the convening authority when appointing the court and when passing upon a suggestion of counsel to the effect that he does not feel that he can adequately represent all accused. The duty of the convening authority in exercising his judicial functions, and of the law officer later at the trial, was expressed by the Supreme Court through Mr. Justice Murphy in the Glasser case as follows:

> "Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from *embarrassing counsel* in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interest which might diverge from those of his first client. . . ." [Emphasis supplied.][128]

The attorney as an officer of the court owes a positive duty of candor and fairness to the court[129] and has sworn never to mislead the judge by any artifice.[130] Consequently, in matters involving the attorneys personal evaluation of his ability to properly represent possible conflicting interests his opinion should have the gravest weight with the Convening Authority or Law Officer. In view of the admonitions contained in the other Canons,[131] there is little likelihood that liberality on the part of the judge would result in the unwarranted use of such a suggested conflict as a method of withdrawing from a case improperly.

B. *Counsel's Duties to Accused*

> . . . . "It is his duty . . . not to divulge his secrets or confidence." . . .[132]

The duty of the defense counsel to maintain inviolate the confidential communications of an accused is thus succinctly stated in the Manual for Courts-Martial, 1951. While the question as to whether an attorney-client privilege exists is a legal rather than an ethical question,[133] some inquiry into the matter herein is justified as in questionable areas an attorney is authorized and should assume that the privilege does in fact exist.[134]

The military rules of evidence reveal the following:

> ". . . . Communications between a client and his attorney (or the agent of the attorney) are privileged when made while the relation of client and attorney existed and in connection with the matter for which the attorney was engaged, unless such communications clearly contemplate the commission of a crime—for instance, perjury or subordination of perjury. Military or civilian counsel detailed, assigned, or otherwise engaged to

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[128] 315 U.S. at 76.
[129] Canon 22, ABA.
[130] Oath of Admission, American Bar Association, *Opinions of the Committee on Professional Ethics and Grievances* 44 (1957).
[131] Canons 4 and 5, ABA.
[132] Par. 48*c*, MCM, 1951.
[133] See Oldham, *Privileged Communications in Military Law*, 5 Military Law Review, p. 17 (DA Pam. No. 27–100–5, July 1959); Opinion 247, ABA.
[134] Opinion 216, ABA.

defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege. . . . The person entitled to the benefit of the client and attorney privilege is the client . . . ."[135]

This duty to the client which has been stated in full in Canon 37[136] would appear to be relatively easy to accomplish. Nevertheless, this is not always the case, as the understanding of the obligation and its application in differing circumstances are often far apart.[137] Perhaps the most perplexing feature of this privilege arises when there appears to be a conflict between the privilege and the ethical duties otherwise due the court and the law. This may most clearly be demonstrated by a consideration of the problem of perjury. As is readily ascertainable from both the Manual provisions and the text of the Canon, an announced intention on the part of an accused to commit a crime is not included in the privilege, rather, counsel should take such action as may be necessary to prevent the crime. However, if there is no announced intent to commit a crime and if the feeling of the attorney is only that his client is not telling the truth, in civilian practice he could withdraw from the case. In the military service this is seldom, if ever, an acceptable answer to appointed counsel's problem. As the lawyer is not

[135] Par. 151*b*, MCM, 1951.

[136] Canon 37, ABA. "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

"If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."

[137] *U.S.* v. *Green*, 5 USCMA 610, 18 CMR 234 (1955), wherein pretrial defense counsel prepared "Memo for trial counsel" at the direction of SJA; *U.S.* v. *McCluskey*, 6 USCMA 545, 20 CMR 261 (1955), wherein legal assistance officer on a civil marriage question was later appointed trial counsel to prosecute client for bigamy; *U.S.* v. *Fair*, 2 USCMA 521, 10 CMR 19 (1953), where witness who had been a suspect is cross-examined by his previous counsel who is now representing other parties in murder trial. See also *U.S.* v. *Turley*, 8 USCMA 262, 24 CMR 72 (1957); *U.S.* v. *Eskridge*, 8 USCMA 261, 24 CMR 1 (1957); *U.S.* v. *Thornton*, 8 USCMA 57, 23 CMR 281 (1957); *U.S.* v. *Lovett*, 7 USCMA 704, 23 CMR 168 (1957).

the judge in the American system of jurisprudence he may properly defend a person whom he fully believes to be guilty. He need not withdraw from a case because he questions the veracity of his client, but should continue to represent the accused. This is not, however, to be taken as license to do anything other than that which is fair and honorable under the law of the land.[138]

If, after a trial, attorney for an accused finds out through a confidential communication to him from his client that his client has committed perjury, then the obligations of the attorney to the court and to the profession[139] appear to be in direct conflict with the privilege. In this type of situation, it is the feeling of the committee on Professional Ethics of the American Bar Association that the underlying policy and purpose and the express obligation of Canon 37 outweigh the requirements of the other canons. Although the opinion is expressed that he should urge his client to tell the court the truth, he should not, if the client fails to heed his advice, reveal the facts to the authorities.[140]

The free communication between the attorney and client protected and encouraged by Canon 37 is only the springboard of counsel's ethical duties to the accused. The extent and the manner in which this and other obtainable information is, or should be, used, serves as the basis for most of the ethical problems which confront counsel.

Counsel must assert every right of his client even if in so doing he must seriously question the activities of his superiors in the office of the Staff Judge Advocate or even the Convening Authority. These persons are in a position greatly to affect the rights of an accused by a myriad of pretrial activities, and therefore they have the opportunity, inadvertantly or otherwise, to create serious legal questions.[141] Problems pertinent to bringing into legal focus ques-

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[138] Canon 5, ABA; but see Taeusch, *Professional and Business Ethics* 64, 66 (1926), where this view is criticized.

[139] Canon 29, ABA (duty to bring perjury to the attention of the authorities); Canon 22, ABA (candor and fairness to the court); Canon 41, ABA (fraud and deception).

[140] Opinion 287, ABA (split decision of the committee).

[141] *U.S.* v. *McMahan*, 6 USCMA 709, 21 CMR 31 (1956), wherein Judge Latimer stated, "However, he [defense counsel] has a solemn duty to defend unreservedly the interests of the accused he has sworn to protect, and fear of disfavor should not deter him from using all honorable means to protect his client's cause. No system of justice can flourish if the representation afforded an accused person is to be neglected because of fear of reprisal. Nor can military justice succeed if those officers who must defend an accused inadequately protect him because they dare not assert every right guaranteed him by the Code"; *U.S.* v. *Zagar*, 5 USCMA 410, 18 CMR 34 (1955).

tionable activities of a person higher in a system of justice are not limited to the military. One writer in discussing the problem has said:

> "The difficulty in inducing a member of the bar to attack a corrupt judge lies in his natural fear of reprisals in case, through influence, political or otherwise, the lawyers efforts prove unsuccessful. As Emerson said to Justice Holmes when the Justice was a student: 'If you shoot at a King you must kill him.'"[142]

He must never forget, however, that his great trust is to be performed within and not outside of the law. There is no duty upon him to set up questionable defenses so that he may aid his client; rather, upon him falls the responsibility of urging only those defenses which are in fact allowed under the law. He cannot with propriety follow the conscience of his client but must accept responsibility for his acts.[143]

The extent to which counsel should go in supporting his client's cause is perhaps best discussed from the viewpoint of what he should not do rather than what he should do. Certainly in all that he does he must strive to uphold the honor and maintain the dignity of the profession.[144]

In maintaining the client's cause, counsel may not utilize any means which are not consistent with truth and honor nor may he mislead the law officer or the court by any artifice or false statement of fact or law.[145] Neither can he aid his client in perpetrating a fraud.[146] Not only must the attorney avoid the breath of impropriety but he must also restrain his client from doing anything which he as an attorney should not do.[147] In this regard, the attorney may not maintain a defense when he is convinced that it is intended merely to harass the opposite party. The presentation by counsel of a defense should be deemed equivalent to an assertion that it is a proper one in his opinion for judicial determination.[148] Counsel also should avoid testifying for his client except, if absolutely necessary, for such matters as the attestation of a document.[149] This prohibition does not apply, however, where counsel is called as a witness for the opposing party[150] nor to cases of sur-

[142] Drinker, *Legal Ethics* 61 (1953).
[143] Canon 15, ABA.
[144] Canon 29, ABA.
[145] Oath of Admission, ABA, par. 4.
[146] Opinion 9, 181, N.Y. County.
[147] Canon 16, ABA.
[148] Canon 30, ABA.
[149] Canon 19, ABA.
[150] Thornton, *Attorneys at Law*, §189 (1914).

prise where there is not sufficient time for the accused to conveniently get another lawyer.[151]

While, as indicated above, there are areas in which counsel should exercise care in not acting he must not, through negligence or inadvertence, fail to act in other areas. If he does decide to refrain from action in these latter areas, he may expect his decision to be viewed by appellate bodies with a critical eye. The following matters have been mentioned by the military courts when examining the adequacy of a counsel's representation: failure to request sufficient time to prepare case, failure to fully advise accused of his rights, cross-examination of witnesses which strengthens the Government's case, failure to conduct a voir dire examination of the court, failure to make timely objections to evidence, failure to present evidence, and failure to argue.[152] Counsel must also exercise consistency with the plea of an accused and may not indicate guilt if accused has entered a not guilty plea.[153] Nor may he act in contradiction of the Uniform Code of Military Justice.[154]

In accomplishing his duty to the client, counsel has the authority to control the incidents of the trial.[155] This control is necessary to the orderly administration of justice and includes the decision as to whether a challenge should be exercised, which witnesses shall be called, and the making of stipulations.[156] His action may include the stipulation of virtually all of the evidence in a case where such action does not substantially injure the material rights of the accused and where accused has assented thereto by actual consent or inaction amounting to ratifying the acts of counsel.[157] The authority to control the trial does not, however, give counsel authority to dismiss the cause on the merits without the express permission of accused nor do any act which is tantamount to this.[158]

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[151] Opinion 64, N.Y. County.

[152] *U.S.* v. *Parker*, 6 USCMA 75, 19 CMR 201 (1955); *U.S.* v. *McMahan*, 6 USCMA 709, 21 CMR 31 (1956); *U.S.* v. *Elkins*, 8 USCMA 611, 25 CMR 115 (1958).

[153] *U.S.* v. *Smith*, 8 USCMA 582, 25 CMR 86 (1958).

[154] *U.S.* v. *McFarlane*, 8 USCMA 96, 23 CMR 320 (1957), wherein counsel for accused charged with premeditated murder indicated to the court-martial that a plea of not guilty was being entered only because the Code prohibited a plea of guilty to a capital charge.

[155] Canon 24, ABA.

[156] *Bank of Glade Spring* v. *McEwen*, 160 N.C. 414, 76 S.E. 222 (1912); *Gardner* v. *May*, 172 N.C. 192, 89 S.E. 955 (1916); Weeks, *Attorneys at Law*, §220 (1878).

[157] *U.S.* v. *Swigert*, 8 USCMA 468, 24 CMR 278 (1957); *U.S.* v. *Cambridge*, 3 USCMA 377, 12 CMR 133 (1953); *Dick* v. *U.S.*, 40 F.2d 609 (8th Cir. 1930); 5 Am. Jur., *Attorneys* §91.

[158] *Seymour State Bank* v. *Rettler*, 164 Wis. 619, 160 N.W. 1084 (1917).

While usually the procedural matters of the trial are within the province of the attorney[159] and his acts will be imputed to the accused,[160] this is not so if to impute the acts would involve a substantial and fundamental right and result in a miscarriage of justice. However, the mere failure to object may not in some cases be considered as a waiver.[161] The courts are also reluctant to impute to an accused the acts of a Special Court-Martial non-lawyer counsel,[162] and yet they do not hesitate to reverse a case if such counsel does not meet the standards desired.[163] There is a correspondingly great tendency to impute counsel's acts to the accused when he is represented by personally selected civilian counsel.[164]

C. *The Duties of Professional Colleagues*

As it is not unusual for an accused in a military trial to be represented by more than one attorney, either all military or a mixture of civilian and military, a consideration of the ethics between such counsel should be considered.[165] Although the Manual and Code provisions seem to imply that when civilian counsel is employed military counsel may be maintained as associate counsel, this is not believed to be determinative of the position of the several counsel nor to materially affect the ethical problems which arise. The matter of having additional counsel is for the determination of the client.[166] Should counsel disagree as to any material issue with regard to the trial the dispute should be fully explained to the accused for his determination. If the decision on how to proceed is such as to preclude effective co-operation on the part of either lawyer, then he should ask the client to relieve him.[167] During the trial, the several counsel should exercise great care to present a

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[159] *U.S.* v. *Ransom*, 4 USCMA 195, 15 CMR 195 (1954).

[160] *U.S.* v. *Smith*, 2 USCMA 440, 9 CMR 70 (1953), wherein the court stated through Judge Brosman: "[D]efense counsel cannot, at the trial, assume that he has no responsibility whatsoever for protecting the interests of the accused and insuring the fair and orderly administration of justice by raising appropriate objections to improper procedures." Case affirmed.

[161] *U.S.* v. *Grosso*, 7 USCMA 566, 23 CMR 30 (1957).

[162] *U.S.* v. *Williams*, 8 USCMA 443, 24 CMR 253 (1957).

[163] *U.S.* v. *Fisher*, 8 USCMA 396, 24 CMR 206 (1957).

[164] *U.S.* v. *Dyche*, 8 USCMA 430, 24 CMR 240 (1957).

[165] Pars. 46*d*, 47, 48, MCM, 1951; Art. 38(b), UCMJ.

[166] ACM 6062, *Hanson*, 8 CMR 671 (1953), wherein the board of review held that either individual counsel or the appointed defense counsel may properly be the chief defense counsel.

[167] Canon 7, ABA; *Tenney* v. *Berger*, 93 N.Y. 524 (1883).

coordinated tactical front, as inconsistency between them might materially lessen the effect of the defense and consequently deny the accused a fair trial.[168]

D. *Duties Between Law Officer and Counsel*

"The law officer is responsible for the fair and orderly conduct of the proceedings in accordance with law in all cases which are referred to the court to which he is appointed. . . ."[169]

The responsibility for the conduct of the trial, while placed ultimately upon the shoulders of the law officer, is also shared by counsel.

This aspect of the attorney's conduct may not be overemphasized as the court has a right to rely on him for complete fairness in its search for truth. He must never misquote the contents of a paper, testimony, argument, or the language of a decision or textbook; nor should he, with knowledge of its invalidity, cite as supporting his cause a decision which has been overruled.[170] The duty of counsel is not simply to his client but also the court. He would violate his oath if he were to incorrectly inform the court on the law or the facts. His obligation to his client is to represent him within the law and not to subvert the law to the client's cause. Should counsel act improperly in his representations to the court he cannot shield himself behind a supposed obligation to the client.[171]

The problem comes into sharpest focus when an opposing counsel has apparently overlooked a decision relevant to a proper decision of a matter which would support his cause. Canon 22 apparently would require that the attorney disclose such cases to the court challenging, if he desires, the soundness of the reasoning upon which they rest or distinguishing them on the facts.[172] As it is not always clear that decision is relevant to a determination of a

[168] *U.S.* v. *Walker*, 3 USCMA 355, 12 CMR 111 (1953), citing with approval *Tatum* v. *U.S.*, 190 F.2d 612 (DC Cir. 1951); *Cornwell* v. *State*, 106 Ohio St. 626, 140 N.E. 363 (1922).

[169] Par. 39*b*, MCM, 1951; this duty is discharged by the president of a special court-martial, par. 40*b*(2), MCM, 1951.

[170] Par. 42*b*, MCM, 1951; Note, The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 *Columbia Law Review* 1039 (1952).

[171] *U.S.* v. *Wolfe*, 8 USCMA 247, 250, 24 CMR 57, 60 (1957), wherein Chief Judge Quinn stated: "A criminal trial is not a guessing game. An accused, alike with the Government, must deal fairly with the court. He cannot withhold information of matters affecting the trial on the chance that they may have a favorable effect, and then, when disappointed, complain." See also *U.S.* v. *Holton*, 227 F.2d 886 (7th Cir. 1955); *People* v. *Beattie*, 137 Ill. 553 (1891).

[172] Opinion 146, ABA.

cause, a test was stated by the Committee on Professional Ethics and Grievances, American Bar Association, as follows:

". . . . Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?"[173]

E. *Duty of Counsel to The Court*

Counsel in their attitude toward the court members should never attempt to curry their favor by fawning, flattery, or pretended solicitude for their personal comfort. Any efforts made by counsel for the comfort or convenience of the members should be concluded with the law officer out of the hearing of the members of the court. They should also, before and during the trial, avoid all communications with them, even as to matters not connected with the trial.[174]

In performing their duties before the court-martial, counsel should treat adverse witnesses with fairness and due consideration.[175] Also, they should carefully avoid eliciting information from a witness which counsel knows is inadmissible in evidence as such practice does not meet a desirable standard of ethics even though it may not be sufficient to cause the reversal of the case.[176] The court's test as to whether this conduct is prejudicial has been stated as (1) does the conduct indicate an intent deliberately to disregard the rules of evidence in order to influence the court and (2) could the improper remarks have reasonably affected the courts deliberations on the findings and sentence.[177]

It is not candid or fair for either attorney to assert in argument as a matter of fact that which has not been proved.[178] He may properly, however, assert in argument not only the proven facts themselves but any reasonable inference which may be drawn from

[173] Opinion 280, ABA.
[174] Canon 23, ABA; *In re Kelly*, 243 Fed. 696 (1917).
[175] Canon 18, ABA; par. 42*b*, MCM, 1951.
[176] Canon 22, ABA; *U.S.* v. *Reid*, 8 USCMA 4, 23 CMR 228 (1957); *U.S.* v. *Narens*, 7 USCMA 176, 21 CMR 302 (1956); *U.S.* v. *Hubbard*, 5 USCMA 525, 18 CMR 149 (1955); *U.S.* v. *Johnson*, 3 USCMA 447, 13 CMR 3 (1953).
[177] *U.S.* v. *Valencia*, 1 USCMA 415, 4 CMR 7 (1952); see also *Berger* v. *U.S.*, 295 U.S. 78 (1935).
[178] Canon 22, ABA.
[179] *U.S.* v. *Doctor*, 7 USCMA 126, 21 CMR 252 (1956), wherein trial counsel repeatedly referred to accused who was charged with false statements as a liar; *U.S.* v. *Lee*, 4 USCMA 571, 16 CMR 145 (1954); *U.S.* v. *Day*, 2 USCMA 416, 9 CMR 46 (1953).

them.[179] These guidelines are applicable with equal force to argument on the issue of guilt or innocence and on the sentence.[180]

V. POST TRIAL REPRESENTATION

The ethical obligations of the trial defense counsel do not end with the pronouncement of the sentence by the court-martial. His duty to represent the accused extends at least through the time that the convening authority takes action on the record of trial and the accused has been fully advised of his appellate rights.[181]

As the power to suspend a sentence resides solely within the power of a convening authority, who also must reassess the appropriateness of the sentence adjudged, it is highly desirable that counsel continue an active representation after trial.

While the canons of ethics condemn private converse about a case with jury members after a trial,[182] a military lawyer is specifically given the right to solicit their signatures to a petition for clemency directed to the convening authority and other appellate agencies with power to act relative to the sentence. This action is limited strictly to clemency matters and may not, even by implication, reveal the vote or opinion of any member on the guilt or innocence of the accused. The military lawyer should in no way attempt to go beyond the allowable limits. The canon restricting this activity is based upon a public policy designed to protect and keep inviolate the discussions within the juryroom and thereby encourage free debate among the members. Although the argument could be advanced that by so inquiring of the jury as to the effectiveness of a particular trial tactic an attorney could improve himself, the action is just as susceptible of a notion of currying favor with the jury.[183] This is especially so in the military service where a single court-martial often hears and decides numerous cases presented by the same counsel.

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[180] *U.S.* v. *Anderson*, 8 USCMA 603, 25 CMR 107 (1958); *U.S.* v. *Fowle*, 7 USCMA 349, 22 CMR 139 (1956); *U.S.* v. *Rinehart*, 8 USCMA 402, 24 CMR 212 (1957); *U.S.* v. *Estrada*, 7 USCMA 635, 23 CMR 99 (1957); *U.S.* v. *Olson*, 7 USCMA 242, 22 CMR 32 (1956); for a comparison with civilian practice which is essentially the same as the military see *Viereck* v. *U.S.*, 318 U.S. 236 (1943); *U.S.* v. *Nettl*, 121 F.2d 927 (3rd Cir. 1941); *Pierce* v. *U.S.*, 86 F.2d 949 (6th Cir. 1936); *In re Dreiband*, 273 App. Div. 413, 77 N.Y. Supp. 2nd (1st Dept 1948); also see *U.S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), where argument was questionable but not improper in view of the nature of the issues in the case.

[181] Pars. 48*j*, 77*a*, and *c*, 82*e*, MCM, 1951.

[182] Canon 23, ABA, provides in part: "A lawyer must never converse privately with jurors about the case. . . ."

[183] Opinion 109, ABA.

In some of the services, it is the practice of the Staff Judge Advocate to seek an interview with an accused immediately after trial for the purpose of gaining information which will assist him in preparing his review of the record of trial and in making the recommendations required therein. This interview is to some extent an integral part of the proceedings designed by the military to assist the convening authority in arriving at an appropriate sentence: therefore, counsel appears ethically bound to protect the accused's rights at this stage as at any earlier stage. The information obtained by this interview is clearly not treated as confidential and may later be utilized to the definite disadvantage of the accused.[184] Should the convening authority consider any matter outside of the record of trial, counsel should assist accused in rebutting or refuting this information.[185] Additionally, should counsel discover any material matter which was not available during the trial he should present it for attachment to the record and consideration by the convening authority. He may not, however, be negligent or dilatory in so doing.[186]

The accused and defense counsel are entitled by the Code and Manual[187] to an impartial review of the case by both the Staff Judge Advocate and the convening authority. The Court of Military Appeals has emphasized that the persons acting on the case must do so in an unprejudiced, individualized manner.[188] As the discretionary acts of the convening authority are judicial in nature the Canons of Judicial Ethics should apply to them, and counsel and the accused have a right to expect him to be guided by the precepts therein expressed.[189]

VI. APPELLATE CONSIDERATION OF INADEQUATE REPRESENTATION

The right to counsel accorded an accused by law has in recent years tended to become a right to "competent" counsel in the view-

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[184] *U.S.* v. *Fleming*, 3 USCMA 461, 13 CMR 7 (1953); JAGJ 1953/9767, 19 Mar 54.

[185] *U.S.* v. *Griffin*, 8 USCMA 206, 24 CMR 16 (1957); CM 395968, *Parrish*, 8 Aug 57.

[186] *U.S.* v. *Webb*, 8 USCMA 70, 23 CMR 294 (1957).

[187] Arts. 6(c), 37, 61, and 64, UCMJ; pars. 38, 84, 85, 86, 87, 88, 89, MCM, 1951.

[188] As to convening authority's duties, see *U.S.* v. *Dean*, 7 USCMA 721, 23 CMR 185 (1957); *U.S.* v. *Wise*, 6 USCMA 472, 20 CMR 188 (1955); *U.S.* v. *Duffy*, 3 USCMA 20, 11 CMR 20 (1953); as to SJA, see *U.S.* v. *Kennedy*, 8 USCMA 251, 24 CMR 61 (1957); *U.S.* v. *Turner*, 7 USCMA 38, 21 CMR 164 (1956).

[189] Preamble, Canons of Judicial Ethics, ABA.

point of the military appellate bodies. This is true also in the Federal and state court system but to a much lesser degree.[190]

This trend is important in the ethical field as it not only indicates the judicial concern with the quality of representation but also should reveal to the practitioner in the field the desirability of being prepared in every case to defend not only his personal conduct but in addition his trial tactics and judgment.

Cases relative to a right to counsel in the military services may be categorized generally as follows: (1) situations involving a denial of a right to personally selected counsel or the creation of the attorney-client relationship;[191] (2) situations wherein an attorney is appointed to represent a possible conflicting interest;[192] and (3) situations involving actual representation of a client which is alleged to be inadequate. The problems incident to and the rules governing the first two categories have been previously discussed. It is felt that the first two groupings do not properly fall within the term inadequate representation.

Quite early in the operation of the Uniform Code of Military Justice, 1950, the Court of Military Appeals adopted the position of the Federal courts with regard to inadequate representation by counsel. This position may be stated simply: (1) appointed and certified counsel are presumed to be competent,[193] and (2) a convicted accused must show that representation by his counsel ren-

[190] *U.S. ex rel Mitchell* v. *Thompson*, 56 F.Supp. 683 (S.D.N.Y. 1944); *People* v. *Gilbert*, 25 Cal. 2d 422, 154 P.2d 657 (1944); *People* v. *Schulman*, 299 Ill. 125, 132 N.E. 530 (1921).

[191] *U.S.* v. *Brady*, 8 USCMA 456, 24 CMR 266 (1957); *U.S.* v. *Rose*, 8 USCMA 441, 24 CMR 251 (1957); *U.S.* v. *Tomaszewski*, 8 USCMA 266, 24 CMR 76 (1957); *U.S.* v. *Gunnels*, 8 USCMA 130, 23 CMR 354 (1957); *U.S.* v. *Nichols*, 8 USCMA 119, 23 CMR 343 (1957); *U.S.* v. *Hounshell*, 7 USCMA 3, 21 CMR 129 (1956); *U.S.* v. *Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954); *U.S.* v. *Moore*, 4 USCMA 482, 16 CMR 56 (1954).

[192] *U.S.* v. *Turley*, 8 USCMA 262, 24 CMR 72 (1957); *U.S.* v. *Eskridge*, 8 USCMA 261, 24 CMR 71 (1957); *U.S.* v. *Thornton*, 8 USCMA 57, 23 CMR 281 (1957); *U.S.* v. *Lovett*, 7 USCMA 704, 23 CMR 168 (1957); *U.S.* v. *McCluskey*, 6 USCMA 545, 20 CMR 261 (1955); *U.S.* v. *Best*, 6 USCMA 39, 19 CMR 165 (1955); *U.S.* v. *Stringer*, 4 USCMA 494, 16 CMR 68 (1954); *U.S.* v. *Fair*, 2 USCMA 521, 10 CMR 19 (1953); *U.S.* v. *Evans*, 1 USCMA 541, 4 CMR 133 (1952).

[193] *U.S. ex rel Weber* v. *Ragen*, 176 F.2d 579 (7th Cir. 1949), *cert. denied* 338 U.S. 809 (1949); *U.S.* v. *Soukup*, 2 USCMA 141, 7 CMR 17 (1953), wherein Judge Brosman at page 20 stated: "In the last analysis, his [appellate defense counsel] argument simply invites a trial at this level, not of the accused, but of the professional judgment and capacity of his counsel. We cannot possibly accept the invitation. Defense counsel at the trial was duly appointed and certified as qualified under the Code."

dered the trial proceedings a ridiculous and empty gesture or completely lacked a judicial character.[194]

This criteria, though very strict, has generally been considered sound as experience shows that the majority of lawyers are, at least, of average caliber and are men of good conscience. Even assuming that accused could have had better counsel the courts have recognized that at least one competent attorney is the loser in every law suit and that a client is entitled to a fair trial, not a perfect one. It is also assumed that where counsel has been appointed the appointing authority knows the competency of the person appointed and has protected the accused's interest.[195]

The Federal[196] and state[197] courts adhere to the rule that trial tactics are wholly within the province of the attorney and will not review his tactical errors with the benefit of hindsight. Tactics are considered a matter between the accused and his attorney.[198] attorney.[198]

The Court of Military Appeals, while never overruling the cases in which they adopted the Federal standard, have by the application of different sets of circumstances to the rule broadened it considerably. The Court has found the following to constitute inadequate representation: a failure to argue on the findings even when intentionally waived by counsel,[199] numerous tactical errors (including cross-examination, lack of voir dire, no peremptory challenge, minimum objections to admission of evidence, no testimony on merits or in mitigation),[200] failure to argue and present evidence in mitigation,[201] and an indication by counsel that he would have entered a plea of guilty in a capital case if possible under the Code.[202]

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[194] *U.S.* v. *Wight*, 176 F.2d 376 (2d Cir. 1949); *Diggs* v. *Welch*, 148 F.2d 667 (DC Cir. 1945), cert denied 325 U.S. 889 (1945): "After appointment of counsel, as required by the Code, an accused, if he contends his rights have not been fully protected, must reasonably show that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of counsel as to manifest a complete absence of judicial character." *U.S.* v. *Hunter*, 2 USCMA 37, 41, 6 CMR 37, 41 (1952).

[195] *Maye* v. *Pescor*, 162 F.2d 641 (8th Cir. 1947).

[196] *Felton* v. *U.S.* 170 F.2d 153 (DC Cir. 1948), *cert. denied* 335 U.S. 831 (1948).

[197] *People* v. *Wren*, 140 Cal. App. 2d 368, 295 P.2d 54 (1956).

[198] *Burkett* v. *Mayo*, 173 F.2d 574 (5th Cir. 1949).

[199] *U.S.* v. *Sizemore*, 2 USCMA 572, 10 CMR 70 (1953).

[200] *U.S.* v. *Parker*, 6 USCMA 75, 19 CMR 201 (1955).

[201] *U.S.* v. *McMahan*, 6 USCMA 709, 21 CMR 31 (1956).

[202] *U.S.* v. *McFarlane*, 8 USCMA 96, 23 CMR 320 (1957).

PROFESSIONAL ETHICS AND THE DEFENSE COUNSEL

During recent years, the decisions[203] of the Court of Military Appeals have revealed a disposition to entertain and consider an allegation of inadequate representation by counsel on little more than a suggestion by the accused that the decision as to what matter, if any, was to be presented to the Court during the presentencing procedure, was faulty. Although the Court in some of the cases decided the question adversely to the accused based upon their examination of the record of trial and its allied papers, it is clear that Judge Latimer's fears expressed in dissent in the Allen case are justified. Judge Latimer stated:

> "It may be expecting too much, but I hope that we are not going to regulate the conduct of the trial participants so closely that we view every decision made by defense counsel, his theories of defense, his trial tactics and techniques, and his every act of omission or commission through a microscopic lens."[204]

The presumption of competency of counsel favored by other court systems and their reluctance to reassess the tactical matters of a trial has been apparently rejected by the military court.[205]

The presumption of competency of military counsel springs out of the background of the officers concerned, including many years of undergraduate and graduate college training, an intensive character investigation, thorough bar examinations, and certification as qualified as counsel by The Judge Advocate General of the appropriate service. When this presumption is abandoned, criminals may then subject their counsel to trial with impunity. If the losing tactics of a lawyer are subject to easy challenge it may lead to rather lengthy proceedings. For example: Trial defense counsel does not present mitigation evidence at the court-martial because in his judgment the adverse effect of prosecution evidence which might be introduced in rebuttal is too great—appellate defense counsel alleges inadequate representation based upon the trial defense counsel's decision—The Court of Military Appeals refers the case to a Board of Review to determine the issue of competency of counsel—the board on the basis of the testimony of trial defense counsel determines the matter adversely to the accused—accused then obtains civilian counsel, who points out that appellate defense counsel had improperly decided not to present certain matters to

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[203] *U.S.* v. *Allen*, 8 USCMA 504, 25 CMR 8 (1957); *U.S.* v. *Armell*, 8 USCMA 513, 25 CMR 17 (1957); *U.S.* v. *Friborg*, 8 USCMA 515, 25 CMR 19 (1957); *U.S.* v. *Williams*, 8 USCMA 552, 25 CMR 56 (1957); *U.S.* v. *Elkins*, 8 USCMA 611, 25 CMR 115 (1958).

[204] *U.S.* v. *Allen*, *supra*, 8 USCMA 504 at 510, 25 CMR 8 at 14 (1957).

[205] For a fine discussion of state and federal practice, see Shulman, Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts, 4 U.C.L.A. Rev. 400 (1957).

the board during the hearing and had not presented accused's case to the court in the most favorable light and, therefore, had inadequately represented the accused—the case ultimately is the subject of a rehearing at which time, because of additional information having been discovered adverse to the accused, trial defense counsel must decide whether to present mitigation—against his better judgment and because of the previous appellate pronouncements relative to the presentation of evidence, mitigation evidence is offered—at later proceedings appellate counsel allege that inadequate representation was present at the trial level rehearing because of the decision to present mitigation which was to the damage of the accused, as it opened the door to aggravating information.

The possibility exampled above may be remote and yet the unjustified damage which might result to a system of justice through a complete adandonment of the presumption of professional competency of counsel is sufficiently great to warrant some exaggeration. Counsel, if professionally incompetent, should not be appointed as such. When they are appointed their integrity and professional judgment must be presumed, for otherwise the entire system of justice must fall for the lack of a firm and dependable foundation.

VII. SANCTIONS

The practice of law, although more than a mere indulgence revocable at the pleasure of a court, is not a property right or a privilege protected by the constitution but is a conditional privilege.[206] One of the principal conditions of the privilege is a continuing good private and professional character.[207]

Although the canons of ethics have no statutory effect, the breach of the standards of conduct established thereby has long been considered sufficient reason to rebuke an attorney or, if the conduct is serious enough, to warrant disbarment.[208]

In almost every jurisdiction a complaint against a lawyer may be filed by anyone. The complaint is usually investigated by a committee of the bar which subsequently refers the matter to a court, if it finds the complaint warrants it. The court, after notice to the attorney followed by a full hearing, may exonerate, censure, suspend or disbar the attorney. The attorney may appeal the decision to the highest court of the system.[209]

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[206] *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Ex parte Secombe* 60 U.S. (19 How.) 9 (1857).
[207] *In the Matter of Rouss*, 221 N.Y. 81 (1917).
[208] *In the Matter of Cohen*, 261 Mass. 484 (1928).
[209] Drinker, *Legal Ethics* 34–35 (1953).

Discipline of an attorney for questionable ethical conduct may be divided into two separate proceedings. First, the power of a court to punish for contempt the behavior of a lawyer before it and, second, the power of the court or judicial system to determine the continued fitness of its officers. The power to punish for contempt is designed to protect the court from direct interference and annoyance in a trial taking place before it, while the power to disbar is intended to protect the administration of justice by culling from the bar persons unworthy of membership and thereby preserving litigants from injury at the hands of those entrusted with their affairs.[210]

Military courts-martial are empowered to punish for contempt, menacing words, signs, or gestures, or disturbing riots or disorders committed before the court. Their action, however, is subject to review by the convening authority of the court-martial.[211]

Convening authorities are prohibited from censuring, reprimanding, or admonishing counsel with respect to the findings or sentence adjudged by a court, or with respect to any other exercise of his functions in the conduct of the proceedings.[212] This same authority is empowered to punish them for misconduct as counsel before a court-martial or for incompetence or breach of ethical conduct. This punishment may take the form of a recommendation of suspension as counsel to The Judge Advocate General, or admonition, instruction, punishment under Article 15, Uniform Code of Military Justice, trial by court-martial, or relief from duties as counsel.[213]

If an allegation of misconduct is made to a convening authority which he determines to be correctable by action other than a recommendation for suspension to The Judge Advocate General, he may then take such measures as mentioned above in the interest of the proper administration of justice. This could, of course, amount to an actual suspension of representation as counsel by the assignment of the officer to other judge advocate duties. However, if the convening authority feels that the other measures at his command are insufficient he may appoint a board of Judge Advocate officers to make findings and recommendations relative to the alleged misconduct. If the convening authority approves a board recommendation to suspend counsel, the report is forwarded to The Judge

[210] *People* v. *Green*, 7 Colo. 237 (1883).
[211] Art. 48, UCMJ; par. 118, MCM, 1951.
[212] Art. 37, UCMJ; par. 38, MCM, 1951.
[213] Par. 43, MCM, 1951; SR 22–130–5, Department of the Army, 26 Mar 51; 1955 NS, MCM, Section 0128.

Advocate General for his action. This action probably could be taken against civilian counsel also.[214]

The grounds for suspension provided in departmental regulations are: (1) demonstrated incompetence, (2) preventing or obstructing justice, (3) fabricating papers or evidence, (4) tampering with a witness, (5) abusive conduct toward the law officer, court or opposing counsel, (6) conviction of a crime involving moral turpitude, (7) disbarment by a state or Federal court, and (8) flagrant or continued violation of any specific rules of conduct prescribed for counsel.

It appears rather an anomally that an officer forbidden by an act of Congress to admonish court-martial counsel is otherwise empowered to punish them. It is the opinion of the Department of the Army that the duties do not conflict as Article 37, UCMJ, is designed to protect counsel while he is acting in a legal and ethical manner while the power to punish provided by paragraph 43, Manual for Courts-Martial, 1951, provides punishment for illegal or unethical conduct.[215] Here again counsel must depend entirely upon the fairness of the convening authority, a person not normally well versed in the nuances of the canons of ethics. This is so even where counsel may have been called upon in a particular case to question the activities of the convening authority.

VIII. CONCLUSION

A large percentage of the criminal proceedings in the military are tried by non-lawyer counsel before special courts-martial. These counsel are subject to the rules of conduct stated in the Manual for Courts-Martial and, in the opinion of this writer, to the canons of ethics as long as they are in fact acting as counsel for an accused in a criminal matter. The rules of conduct contained in the Manual are of necessity minimal, and these counsel seldom if ever have available for study the opinions of the military appellate courts. Even when these opinions are available, it is doubtful whether the non-professionally trained counsel could, or would, ferret out the instructions as to their conduct indicated in the decisions. Additional guidelines should be provided these counsel so that they can more easily discharge their assigned duties within the framework of proper trial conduct.

There is little, if any, difference in the ethical standards of the military lawyer and his civilian counterpart. Differences may be noted, however, in the problems experienced in applying the stand-

[214] *U.S.* v. *Nichols*, 8 USCMA 119, 23 CMR 343 (1957).
[215] JAGJ, 1952/6627, 9 Sep 52.

ards in practice and in the manner in which the courts apply their tests in determining whether a conflict of interest has been present in a particular case or whether an accused has been inadequately represented. In the field of conflict of interests the problems are complicated in the military by the organization required. For example, in the Army normally the Law Officer, the Trial Counsel, and the Defense Counsel are employed in the Office of the Staff Judge Advocate, which latter person suggests the employment of the professional individuals in each case to the convening authority for appointment, periodically rates each attorney's competence by a formal report through the convening authority, is the pretrial lawyer who closely resembles a district attorney, and conducts the first post trial legal review of the record of trial. It is readily apparent that this is a situation not only completely foreign to civilian concepts but in complete derogation of the principles announced in the opinions rendered by the American Bar Association under Canon 6.[216] Congress attempted to alleviate the problems created by the organization by prohibiting conflicting activities of an attorney in the more apparent situations. It was not possible, however, to legislate away the influence, for good or evil, which is present simply because of the nature of the organization. To assure that counsel appointed to represent an accused is able to give him the undivided fidelity, due him under the canons of ethics, requires of both the staff judge advocate and counsel a much higher degree of objectivity and ethical consideration than is required of any civilian system. The attainment of these ends is not only feasible but desirable and may be accomplished by the avoidance by all members of the military justice system of even the appearance of impropriety.

There have been few cases in the military where an accused was inadequately or ineffectively represented because of some act on the part of counsel which was the result of personal disloyalty. The cases, however, in which counsel, over his protest, has represented possible conflicting interest and those in which his tactical judgment is questioned by appointed appellate counsel are more numerous. It would appear, therefore, that in these latter areas the ethical considerations designed to protect the trial defense counsel should be strengthened. The American concept of justice requires that great faith be placed in the trial forum and in the integrity of the officers who practice there.

[216] Opinions 16, 33, 49, 50, 104 (held that an office associate, not a partner in any way, could not accept employment to represent an accused who had been examined and bound over to Grand Jury before another attorney occupying the same suite of offices), 142, 161, 186, 220, 245, ABA.

The officers responsible for the appointment of counsel must, if the system is to operate as envisioned by its creators, recognize the disabilities of the organizational necessities and make available to an accused the best possible counsel. Subsequent to appointment of such counsel they must fully realize that his loyalty to the Government, other than as required of him as an officer of the court, no longer exists. The public confidence in the integrity and impartiality of the administration of military justice must be maintained if the system is to mature and improve. This may be accomplished only if Staff Judge Advocates and Convening Authorities are sufficiently objective to grade impartially the competence of those defense lawyers who defend an accused by pointing out the improper acts of their superior officers and if defense counsel are sufficiently indoctrinated in their ethical responsibilities to challenge any phase of a proceeding regardless of the ultimate effect on their personal careers.

At this time, there is no provision in the system whereby the has perhaps even more effect upon the ultimate justice of the sysbe brought to the attention of the bar for critical action. Yet, to a great degree the basic fairness or the lack thereof of persons active in the administration of military justice other than counsel has perhaps even more effect upon the ultimate justice in the system than that of counsel.

The present lack of ethical coordination between different defense counsel at the various levels of the proceedings appears to be undermining, to a degree, confidence in the competence of the military lawyer and consequently in the integrity of the system. The attempts being made in recent cases by appellate appointed counsel to insure the accused a perfect trial rather than a fair one by challenging the tactics employed by trial defense counsel could, of course, be carried to a ridiculous extreme as demonstrated in a previous section.

It is not the intention of this writer to suggest, even by implication, that truly inadequate representation by counsel through disloyalty or negligence should not be brought to the attention of the courts and the accused thereby assured a fair trial. It is, however, my contention that appellate allegations of inadequate representation based upon the tactical judgment of the defense counsel and made without exhaustive investigation of the facts available at the time of the decision question improperly the competence and integrity of the trial lawyer upon whose shoulders rests the primary responsibility for the defense of those accused of crime. Trial defense counsel should be faced only with the problem of

what, in his judgment, is in the best interest of the client and not what is in the best interest of the client which may be later personally justified to appellate tribunals in the event of adverse results. Very often the temper and atmosphere of the trial forum affect a decision, yet these conditions never appear in a record of trial. Closer cooperation between the different levels of the system could easily insure, prior to an allegation, whether an accused was or was not represented by loyal counsel who exercised sound judgment. Even the highest reaches of ethical standards require no more than this of trial lawyers.

Although it is believed that the military justice system operating today would, from an ethical standpoint, compare very favorably with any other system dispensing justice throughout the world, some changes and additions might be suggested for its further improvement.

IX. RECOMMENDATIONS

Based upon the conclusions reached in the previous section, it is believed that continuing studies would be appropriate in an effort constantly to improve the application of ethical standards in the administration of military justice. These studies should include a complete reevaluation of the internal organization of the justice system which, as presently operated, appears to create rather than diminish conflicts of interest and increases the possibility of breaches of ethical obligations. It should be noted here that there is no requirement in the Uniform Code of Military Justice that counsel or law officer be under the direct control or command of the Convening Authority or the Staff Judge Advocate, other than the appointment of these persons to a court-martial. After preliminary studies and a successful pilot program, the Department of the Army, on 1 January 1959, established a program which assigns all law officers to the Office of The Judge Advocate General. Consideration should also be given to the feasibility of separating completely the command structure of the several trial offices of the Staff Judge Advocate, Defense Counsel, and Trial Counsel. Preliminary studies were instituted in the Department of the Army relative to establishing a separate structure for the defense counsel.[217] Although there is possibly a closer relationship between the staff judge advocate and the trial counsel, it is difficult to accomplish a completely impartial post trial review of a trial when one side of the controversy has or may have been conducted under

[217] A committee was established at Department of the Army to study defense counsel organizational problems; no pilot program, however, resulted from these studies.

the tactical guidance of the person reviewing the case. Therefore, a similar study would not be inappropriate relative to the position of trial counsel.

A simplified code of trial conduct should be made available to counsel, including special court-martial non-lawyer counsel, to guide them in their conduct during trials. This would help not only the counsel themselves but also would, if it had departmental approval, inform convening authorities of what is expected of counsel. A code similar to that suggested by the National Association of Trial Lawyers[218] could be adapted to military use for this purpose. One possible adaptation of this Code is included herein as an Appendix.

The military's system of justice is constantly under the close scrutiny of the public, more so perhaps than any other system of justice. It is more closely scrutinized than the comparable civilian systems because military law is a creature of statute and more easily affected by the political pressures of outraged mothers and fathers when they realize that their sons have been adjudged criminals. Consequently, the minor dereliction of one member may be national news as representative of the system, while a similar incident in the civilian system would not make a local newspaper. As a result, it is imperative that military lawyers understand and adhere to a standard of ethics closer to the hope of the profession than to that which will get by in the courts.

In order to accomplish the desired level of ethical conduct, the institution of service-wide periodic orientation and instruction in ethics would be helpful. This program should include not only junior lieutenants but also senior officers including staff judge advocates and convening authorities. If these latter persons are to judge and punish junior officers for breaches of ethics, they must have a complete understanding of the problems which might arise.

At present, there is no readily available means whereby an officer can obtain an authoritative opinion on an ethical problem which might be presented in a given situation. This creates a diversity of solutions to ethical problems which cannot be desirable in a system in which all phases of the trial forum are so closely associated. A central committee on the departmental level similar to the American Bar Association's Committee on Professional Ethics and Grievances would be most helpful to attorneys in the field and would afford any lawyer, regardless of rank or legal office, an opportunity to have a course of conduct in the profession impartially analyzed.

[218] A Code of Trial Conduct, 43 *American Bar Association Journal* 223 (1957).

Ethical conduct, while aided and guided by all of the foregoing precepts, standards and suggestions, is in the final analysis the product of constant judging by the attorney or judge of the abstract principles of right and wrong in varying factual situations. A renewed and undiminishing interest in ethics on the part of all persons active in the military justice system is perhaps the only panacea for the present or future ills of the system, be they real or fanciful.

APPENDIX

A PROPOSED CODE OF MILITARY TRIAL CONDUCT

PREAMBLE

Military counsel who engage in trial work have a specific responsibility to strive for the prompt, efficient, ethical, fair and just disposition of every case.

To his client, each counsel owes undivided allegiance, the application of the utmost of learning, skill and industry, and the employment of all honest and appropriate means within the law to protect and enforce legitimate interests. In the discharge of this duty, counsel should not be deterred by any real or fanciful fear of judicial or command disfavor or public unpopularity, nor should he be influenced, directly or indirectly, by any considerations of self-interest.

Generally speaking, the purpose of his Code is to furnish a guide for the conduct of military counsel, both lawyer and non-lawyer, doing trial work. The intent is not to supplant the Canons of Professional Ethics but to supplement and stress certain standards of conduct contained in the Canons.

Throughout the Code when the word "client" or "party" is used it refers to both the United States and the accused person. Similarly, when the word "counsel" is employed it refers to both the Trial Counsel and the Defense Counsel unless it is specifically otherwise indicated.

This Code expresses only minimum standards and should be construed liberally in favor of its fundamental purpose, consonant with the fiduciary status of the military counsel and so that it shall govern all situations whether or not specifically mentioned herein.

1. EMPLOYMENT

a. Every person accused of crime has a right to a fair trail, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. Requests

for service in criminal cases should not lightly be declined or refused merely on the basis of the officer's personal convenience or opinion concerning the guilt of the accused or repugnance to the accused or to the crime charged.

b. Counsel may not represent interests which conflict. Counsel represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

2. CONDUCT OF CASES

a. Having been appointed defense counsel or having accepted employment as individual counsel in a case, the counsel's duty, regardless of his personal opinion as to the guilt of the accused, is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper matter in mitigation of punishment or extenuation of the crime. A confidential disclosure of guilt does not require a withdrawal from the case. However, counsel should never offer testimony which he knows to be false.

b. The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of that person's probable guilt.

c. The Trial Counsel's primary duty is not to convict but to see that justice is done. Credible evidence that might tend to prove the accused's innocence should not be suppressed.

3. COUNSEL AS A WITNESS

Counsel should not conduct the trial when he knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, counsel should not argue the credibility of his own testimony.

4. PERSONAL EXPERIMENTS

Counsel should never conduct or engage in experiments involving any use of his own person or body except to illustrate in argument what has been previously admitted in evidence.

5. DISCRETION IN CO-OPERATING WITH OPPOSING COUNSEL

The counsel and not the client has the discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admission of facts.

6. RELATIONS WITH OPPOSING COUNSEL

a. Counsel should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.

b. Counsel should avoid indulgence in disparaging personal remarks or acrimony toward opposing counsel and should remain wholly uninfluenced by any ill feeling between respective clients. He should abstain from any allusion to personal peculiarities and idiosyncracies of opposing counsel.

7. WITNESSES

a. Counsel should thoroughly investigate and marshal the facts. Subject to the provisions of Paragraph 8 hereof, he may properly interview any witness or prospective witness for the opposing side in any case without the consent of the opposing counsel or party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to take affirmative action to disclose any evidence or the identity of any witness.

b. Counsel should not participate in a bargain with a witness as a condition of his giving evidence, but this does not preclude payment of non-contingent fees to expert witnesses.

c. Counsel may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.

d. Counsel should never be unfair or inconsiderate to adverse witnesses, including the accused, or ask any question intended only to insult or degrade the witness. He should never yield in these matters to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

e. Counsel should not ask questions which affect the witness' credibility only by attacking his character, except those encompassed in recognized impeachment procedures.

8. COMMUNICATIONS WITH OPPOSING PARTY

Counsel should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

9. RELATIONS WITH THE LAW OFFICER (PRESIDENT OF SPECIAL COURT)

Counsel should never show marked attention or unusual hospitality to the Law Officer (or President of a Special Court), uncalled for by the personal relations of the parties. He should avoid anything calculated to gain or having the appearance of gaining special personal consideration or favor from the Law Officer (or President of a Special Court).

10. TRIAL CONDUCT TOWARD LAW OFFICER (OR PRESIDENT OF A SPECIAL COURT)

a. During the trial, counsel should always display a dignified and respectful attitude toward the Law Officer (or President of a Special Court) presiding, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. It is both the right and duty of counsel fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate record of trial is made. In this regard, he should not be deterred by any fear of judicial or command displeasure or even punishment. Counsel, regardless of fear, threat or imposition of punishment, should not reveal the confidences of his client.

b. Counsel should not discuss a pending case with the Law Officer (or President of a Special Court) without the opposing counsel's presence or his having been extended a reasonable opportunity to be present.

c. Counsel should never deliver to the Law Officer (or President of a Special Court) any letter, memorandum, brief or other written communication without concurrently delivering a copy to opposing counsel.

11. MEMBERS OF THE COURT-MARTIAL

a. Counsel should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any court member, such as fawning, flattery, actual or pretended solicitude for the mem-

ber's comfort or convenience, or the like. Before and during the trial he should avoid conversing or otherwise communicating with a member on any subject, whether pertaining to the case or not.

b. It is the defense counsel's right, after the court-martial has adjourned, to interview the members to determine whether they desire to submit a petition for clemency.

c. Before the court-martial is sworn to try the case, counsel may investigate the prospective court members to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families.

d. Counsel should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward the court-martial or any member thereof.

12. COURTROOM CONDUCT

a. In the voir dire examination of the court, counsel should not state or allude to any matter not relevant to the case or which he is not in a position to prove by admissible evidence.

b. Counsel should never misstate the evidence or state as fact any matter not in evidence but otherwise has the right to argue in the manner he deems effective, provided his argument is mannerly and not inflammatory.

c. Counsel should not include in the content of any question the suggestion of any matter which is obviously inadmissible.

d. A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the court members.

e. Counsel should conduct the voir dire examination and the examination of all witnesses from the counsel table or other suitable distance except when handling documentary or physical evidence or when a hearing impairment or other disability requires that he take a different position.

f. In all cases in which there is any doubt about the propriety of any disclosure before the members of the court, request should be made for leave to approach the bench, or for an out of court hearing, and to obtain a ruling out of the court's hearing, either by making an offer of proof or by propounding the question and obtaining an immediate ruling.

g. Counsel should not assert in argument his personal belief in the guilt or innocence of the accused or the integrity of his witnesses, as distinct from a fair analysis of the evidence touching those matters.

h. Counsel should not engage in exchanges of banter, personalities, argument or controversy with opposing counsel. His objections, requests and observations should be addressed to the Law Officer (or President of a Special Court).

13. COURTROOM DECORUM

a. Counsel should rise when addressing or being addressed by the Law Officer (or President of a Special Court), except when making brief objections or incidental comments.

b. While the court is in session, counsel should not assume an undignified posture. He should always be attired in the proper uniform.

14. PUNCTUALITY AND EXPEDITION

a. Counsel should be punctual in all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case of any circumstances requiring his tardiness or absence.

b. Counsel should make every reasonable effort to prepare himself fully prior to court appearances.

c. Counsel should see to it that all depositions and other documents required to be obtained are obtained promptly, should consider stipulating in advance with opposing counsel to all noncontroverted facts, should give opposing counsel, on seasonable request, an opportunity in advance to inspect all evidence of which the law permits inspection, and in general, should do everything possible to avoid delays and to expedite the trial.

15. CANDOR AND FAIRNESS

a. The conduct of the counsel before the court and with other counsel should at all times be characterized by candor and fairness.

b. Counsel should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, cite as authority a decision that has been vacated or overruled; or a statute that has been repealed; or in argument assert as a fact that which has not been proved, or, in opening arguments mislead his opponent by concealing or withholding positions upon which his side then intends to rely.

c. Counsel should be extraordinarily careful to be fair, accurate, and comprehensive in all ex parte presentations and in drawing or otherwise procuring affidavits.

d. Counsel should not offer evidence which he knows is inadmissible, and he should not endeavor to get the same before the court-martial in any manner. Neither should he include in an argument addressed to the Law Officer (or President of a Special Court), remarks or statements intended improperly to influence the court-martial or the public.

e. Counsel should not propose a stipulation in the presence of the court members unless he knows or has reason to believe the opposing counsel will accept it.

f. Counsel should never file a pleading or any other document he knows to be false in whole or part or which is intended only for delay.

16. DISCOVERY OF IMPOSITION OR DECEPTION

When counsel discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, the United States, the accused, or other counsel, he should promptly endeavor to rectify it.

COMMENTS

Knowledge in Article 92 Offenses—When Pleaded, When Proven?

The issue facing the United States Court of Military Appeals in *United States* v. *Tinker*[1] was whether or not knowledge was an essential averment in the specification alleging violation of a "lawful general order" to which the accused had pleaded guilty.[2] In disposing of accused's assignment of error in this respect as without merit, the Court of Military Appeals held that a pleading alleging violation of a lawful general directive promulgated by the Commander, U. S. Forces, Azores, need not contain an averment that the accused had knowledge of such directive.[3] Involved in the reasoning of this holding are several concepts relating to the pleading and proof of knowledge of orders which are not immediately apparent from a reading of the opinion, one of which is the problem of definition.

Article 92 represents a consolidation, in statutory form, of prior law in the Army, at least.[4] In the prior case-law, general orders were referred to as "standing orders," which were directives of broad application and were customarily issued by commands as subordinate as camp, post, or station,[5] and even at the battalion[6] and company level.[7] A general order is "one which is promulgated by the authority of a Secretary of a Department and which applies generally to an armed force, or one promulgated by a commander which applies generally to his command."[8] For "commander," as it is used in contrast to the term "Secretary," one must interpolate the qualifying phrase "who occupies a substantial position in effectuating the mission of the service,"[9] because the term "general orders" is not in all instances synonymous with the prior term "standing orders,"[10] irrespective of what the older case-law indicates.[11] Of course a commander of an oversea theater, because he

[1] 10 USCMA 292, 27 CMR 366 (1959).

[2] This offense is proscribed in Article 92(1), UCMJ, 10 U.S.C. 893(1) (1952 Ed., Supp. V), and provides that a court-martial may punish any person subject to its jurisdiction who violates or fails to obey a lawful general order or regulation.

[3] *U.S.* v. *Tinker*, supra at 294, 27 CMR at 368.

[4] Hearings before Subcommittee No. 1, House Committee on Armed Services, on H.R. 2498, 81st Cong., 1st Sess., p. 1229 (1949); *U.S.* v. *Snyder*, 1 USCMA 423, 428, 4 CMR 15, 20 (1952), *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951*, at 215.

[5] *U.S.* v. *Snyder*, *supra*, note 4.

[6] CM 341379, *Wood*, 7 BR–JC 79 (1950), battalion standing orders.

[7] CM 267881, *Lane*, 44 BR 169 (1944), company standing orders.

[8] Par. 171*a*, MCM, 1951.

[9] *U.S.* v. *Brown*, 8 USCMA 516, 518, 25 CMR 20, 22 (1957).

[10] Id. at USCMA 517, 25 CMR 23.

[11] See notes 6 and 7, *supra*.

is a major commander, i.e., in a substantial position to effectuate the mission of the service, may promulgate general orders.[12] One indication of substantial position is the authority to convene general courts-martial,[13] and while earlier Court of Military Appeals opinions indicated that prior case-law would be followed, the Court's position has changed along with its composition. Thus, although the *Snyder* and *Arnovits* cases[14] indicated without qualification that a post commander was empowered to issue a general order, a serious doubt now exists as to whether these cases are valid today.[15] It is suggested that the test of general court-martial jurisdiction is a poor one because the Secretary of a Department, by virtue of Article 22(6) of the Code,[16] can invest any commander with authority to convene general courts-martial, and the test would then be subject to the fancy of a Secretary.[17]

Army Regulations provide for a publication medium known as General Orders, which may be published by any command except a detachment, company, or organic battalion.[18] The commander of a separate battalion, or any superior commander, may publish General Orders,[19] which are directives applying to all or a large

[12] Commander U.S. Army Forces Far East, *U.S.* v. *Stone*, 9 USCMA 191, 25 CMR 453 (1958); Commander U.S. Army Europe, *U.S.* v. *Statham*, 9 USCMA 200, 25 CMR 462 (1958). Dictum in *Stone* indicates that commanders of Military District of Washington and the continental armies may also have authority to publish general orders.

[13] *U.S.* v. *Tinker*, 10 USCMA 292, 27 CMR 366 (1959); cf. *U.S.* v. *Brown*, 8 USCMA 516, 519, 25 CMR 20, 23. See also opinion of Ferguson, J., in *U.S.* v. *Keeler*, 10 USCMA 319, 27 CMR 393 (1959), as an indication that this may become the principal prerequisite for authority to promulgate general orders. Inasmuch as the *Keeler* case contains three independent opinions, none agreeing on the law, and the Ferguson opinion is based on cases which are inapposite, this test cannot be considered as having jelled.

[14] *U.S.* v. *Snyder*, 1 USCMA 423, 4 CMR 15 (1952); *U.S.* v. *Arnovits*, 8 USCMA 538, 13 CMR 94 (1953).

[15] See opinion by Ferguson, J., in *U.S.* v. *Keeler*, note 13, *supra*. It is true that the commanders of Camp Lejeune (Snyder case) and Fort Sill (Arnovits case) did exercise general court-martial jurisdiction, but neither result was premised on this power, nor is it made a ground for distinction in the *Keeler* case, where the order was issued by the commander of an air base, the equivalent of a post or camp.

[16] 10 U.S.C. 822(6) (1952 Ed., Supp V).

[17] Latimer, J., dissenting in *U.S.* v. *Keeler*, *supra*, note 15. Should this become the test, and the Secretary empower many subordinate commanders to convene general courts-martial, would the Court then go behind the naked authority to examine either the purpose of the grant or the extent to which such authority is actually exercised?

[18] Par. 17, AR 310–110A, 18 Jan 1955.

[19] Par. 1, AR 310–110B, 18 Jan 1955.

part of the command,[20] and are appropriate for announcing post or garrison regulations.[21] And these very regulations were resorted to by the Court of Military Appeals to determine that a company commander cannot issue a general order, violation of which is cognizable under Article 92(1).[22] Although there is nothing to indicate that Congress intended that resort be made to Army Regulations for identification of a general order, the Court of Military Appeals has failed to grasp this fact and has intermingled the concepts of "standing orders" and administrative publications. However, the only case in which this intermingling of concepts occurred was really a problem in punishment rather than in authority. Prior to the Uniform Code of Military Justice, violation of standing orders, and a mere failure to obey an order were punishable to the same extent, forfeitures and confinement not to exceed six months.[23] With no disparity in punishment, there remained only an academic distinction between these offenses, as both were mere misdemeanors. However, with the advent of the Uniform Code, both offenses were dignified by statutory recognition,[24] and the President established different punishments.[25] Violation of general orders is now punishable by not more than a dishonorable discharge, total forfeitures, and confinement for two years,[26] thus raising a former misdemeanor to the status of a felony,[27] a drastic increase in the gravity of this offense. Thus, it may be argued that the decision in *United States* v. *Brown* was dictated by the Table of Maximum Punishments, for this case was returned to the service concerned for reassessment of the sentence

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[20] Id., par. 5*a*.

[21] Id., par. 6*j*. From this provision, it could be inferred that a post commander, irrespective of the authority to convene general courts-martial, is empowered to issue general orders. Latimer, J., makes this argument in his dissent to *U.S.* v. *Keeler, supra*, note 15.

[22] *U.S.* v. *Brown*, 8 USCMA 516, 25 CMR 20 (1957.)

[23] Par. 117*c*, MCM, 1949. (Punishment for failure to obey NCO's order was limited to a period of three months).

[24] Art. 92(1), UCMJ, violation of general orders; Art. 92(2), UCMJ, failure to obey any other lawful order.

[25] Art. 56, 10 U.S.C. 856 (1952 Ed., Supp V), empowers the President to fix maximum limits of punishment. Pursuant to this authority, he has established a Table of Maximum Punishments which is embodied in par. 127, MCM, 1951.

[26] MCM, 1951, at 221.

[27] A felony, in military criminal law, may be considered as any offense for which the authorized punishment includes a dishonorable discharge or confinement for more than one year, irrespective of the actual sentence imposed. *U.S.* v. *Moore*, 5 USCMA 687, 18 CMR 311 (1955). See *U.S.* v. *Marrelli*, 4 USCMA 226, 287, 15 CMR 276, 287 (1954).

under the limitation of punishment for violation of Article 92(2).[28] This appears to be a situation where the punishment determined the crime, rather than vice versa, and furnishes the only compelling reason why the Court should have departed from valid case-law existing prior to the Uniform Code.[29]

From the foregoing analysis, it can be seen, then, that a general order, as far as prosecution is concerned, must be defined as a directive of broad application, issued by a commander to all or a substantial part of his command, where the order is "general" in the sense of Article 92(1). In other words, case-law must be examined before a prosecution under Article 92(1) is undertaken. Once the existence of the general order is established, the question then arises, what of knowledge? It may safely be stated as an unvarying rule that if the order is general in the sense of Article 92(1), knowledge need not be alleged.[30] But what about proof? Here a dichotomy exists in the law, because knowledge of some general orders is conclusively presumed, but as to other general orders there is no presumption, conclusive or otherwise, this despite the fact that there is no mention in Article 92(1) of knowledge as an element.

The Manual for Courts-Martial provides: "As a general rule, ignorance of the law, or of regulations or directives of a general nature having the force of law, is not an excuse for a criminal act. . . . Also, before a person can properly be held responsible for a violation of any regulation or directive of any command inferior to the Department of the Army . . . or inferior to the headquarters of a Territorial, theater, or similar area command (with respect to personnel stationed or having duties within such area), it must appear that he knew of the regulation or directive, either actually or constructively. Constructive knowledge may be found to have existed when the regulation or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused ought to have known of its existence."[31] The concept of constructive knowledge as it is applied to violation of standing orders first appeared in the 1949 Manual for Courts-Martial,[32] as a relaxation of the extremely harsh earlier rule that

[28] Maximum punishment authorized is bad conduct discharge, total forfeitures, and confinement for six months; MCM, 1951, at 221.
[29] CM 267881, *Lane*, 44 BR 169 (1944), company standing orders.
[30] *U.S.* v. *Snyder*, 1 USCMA 423, 4 CMR 15 (1952); *U.S.* v. *Arnovits*, 3 USCMA 538, 13 CMR 94 (1953); *U.S.* v. *Tinker*, 10 USCMA 292, 27 CMR 366 (1959).
[31] Par. 154*a*(4), MCM, 1951.
[32] Par. 140*a*, MCM, 1949.

lack of knowledge of general orders was not a defense.[33] This relaxation of the maxim *ignoratia legis non excusat*, by resort to the theory of constructive knowledge, was limited, by its own terms, to orders of broad application. Before evaluating this concept, it may be profitable to consider a detailed exposition of what constitutes constructive knowledge. This is most ably expounded by an Air Force board of review in the *Sanders* case.[34] Sanders, assigned to a subordinate unit of the 58th Fighter Bomber Wing, was found in an off-limits area during a curfew period, in violation of a regulation of the Wing. This regulation had been posted on the unit bulletin board for several weeks prior to the accused's alleged misconduct and members of the accused's unit were required to read the board twice a day. The accused admitted knowing it was his duty to read the board and claimed he had done so carefully but stated he had never seen the regulations in question, did not know that the area in which he was found was off-limits, and had never heard the substance of the regulation discussed at unit formations. The board first considered the pertinence of constructive knowledge and laid down, as a proper predicate of proof, the following requirements: prima facie proof that the directive in question is of a notorious nature, or that it has been conspicuously posted or distributed, and the accused is shown to be a member of the class of persons which ought to have known of its existence. The board then examined the conclusiveness of constructive knowledge.

". . . . [W]e do not mean to say that a prima facie *factual predicate* establishing constructive knowledge presented by the prosecution cannot be attacked by the defense evidence. Obviously such is not the case. However, it cannot be upset by an accused's bold assertion that he has not read the directive and has no actual knowledge of it. To successfully attack prima facie proof of constructive notice, the evidence must of necessity tend to establish that the factual foundation upon which constructive knowledge is based is not true, i.e., that the directive was not posted permanently on the bulletin boards, or, that the accused was not a member of the class of persons at the time of the violation who 'ought to have known of [the regulation's] existence.' . . . Lest we be misunderstood, we wish to make it plain that evidence which will establish the basic foundation for constructive knowledge, *may* at the same time prove actual knowledge in a given case. . . . On the one hand, unrebutted proof that the directive in question has been duly placed on the bulletin board which the accused is required to read with regularity, conceivably would

[33] Par. 126*a*, MCM, 1928, provided that "ignorance of the law is not an excuse for a criminal act. This rule may be partially relaxed by courts-martial in the trial for purely military offenses of soldiers recently enlisted." See also Winthrop, *Military Law and Precedents* (2d Ed. 1920 Reprint) 38.

[34] ACM S–7959, 14 CMR 889 (1954).

> entitle a court circumstantially to infer that the accused had *actual knowledge* of the regulation at the time of the alleged violation. . . . On the other hand, hypothecate identical proof rebutted by *credible* testimony for the defense that the accused had not read the directive, because, for instance, during the period of publication he refused to go near the bulletin board . . . . We would not hesitate to hold that the accused had *constructive knowledge* sufficient to justify conviction."[35]

How have the service boards of review applied constructive knowledge? In ACM S–2898, *Hill*,[36] the accused was alleged to have violated Hospital Regulations prohibiting financial dealings by the hospital staff with patients. Constructive knowledge was found to exist because the regulation had been posted on the unit bulletin board for some three years, the accused admitted having read the bulletin board fairly closely, at least once daily, and acknowledged awareness of a thick sheaf of regulations on the board, but denied knowledge of the particular regulation. He further acknowledged that he should not have had financial dealings with patients. In ACM 5479, *Lindsey*,[37] a board of review failed to find constructive knowledge of a Third Air Force directive on the part of the accused, a member of the 7th Air Division, because the regulation became applicable to the accused's command only three days prior to his alleged misconduct, and there was no evidence of distribution or posting of the regulation, or notice of its applicability to members of the accused's command. In the *Haney* case,[38] which concerned Article 92(2), evidence of the promulgation and posting of a division circular was held insufficient to establish constructive knowledge where the accused's duty assignment was away from his organization, officers were not required to read the bulletin board (Haney was an officer), and there was no proof that the circular had been widely circulated or discussed among members of the unit. A board of review, in the *Genesee*[39] case, focused its attention on the duty and opportunity of an accused to acquire knowledge of a directive. In this case, the accused was club manager of an officers' mess. He joined his organization prior to the issuance of the regulation in question, which was posted on his unit bulletin board on 15 November. The accused was on temporary duty at another installation during the periods 19 November through 3 December and 8 through 14 December. The first violation was alleged to have occurred on 4

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[35] Id. at CMR 893–894.
[36] 5 CMR 665 (1952).
[37] 7 CMR 587 (1952).
[38] CM 358808, 9 CMR 386 (1953) pet. denied 9 CMR 139 (1953).
[39] ACM 7506, 13 CMR 871 (1953).

December, 18 days after the order was posted, during which period the accused had been present at his station for only four days, due to his temporary duty elsewhere. In addition, he was excused from reading the unit bulletin board, attending unit meetings and ordinary formations, and was never assigned details in the unit. If required to perform duties, he was so advised by telephone, whereas other members were notified of such matters by the posting of such information on the bulletin board. The board of review concluded that the evidence failed to establish knowledge, either active or constructive, apparently on the theory that the accused had neither the duty nor opportunity to learn of the directive.[40] In contrast, a board of review in CM 369088, *Rice*,[41] was able to find constructive knowledge of a division circular placing houses of prostitution off-limits, where the evidence indicated that the regulations had been conspicuously posted, that some 30 off-limits signs were posted in the village in question, some indicating that side streets and alleys were forbidden territory, others indicating the entire village was out of bounds. The house where the accused was found was located in an area where prostitutes were known to reside, which resulted in location nearby of an off-limits sign during the six months prior to the alleged violation. No mention was made of whether the accused, an officer, was required to read the unit bulletin board. In the *Fraser* case,[42] constructive knowledge was also found present. Here the accused was charged with violating an air base regulation limiting surface travel, on a Class A pass, to points within 100 miles of the base. Evidence that the squadron's Standing Operating Procedures, referring to this limitation on passes, was posted on the bulletin board and was required reading, that there was a large map in the orderly room beside the mail window, with distance limits clearly marked, coupled with the accused's admissions that he should have read the policy book posted on the bulletin board and did not, and that he was aware of the presence of the map but never examined it, were held by the board to satisfy the requirements of constructive knowledge.

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[40] To the same effect, see CM 367978, *Bruce*, 14 CMR 260 (1953) pet. denied 14 CMR 228 (1954), Corps directive; ACM 10994, *Robinson*, 20 CMR 816 (1955); CM 367506, *Snelson*, 14 CMR 287 (1953), in which BR refused to find constructive knowledge of a "black-market" regulation where armed forces radio "spot" announcements, and legend on face of PX ration card advised that "black-marketing" was prohibited, but did not make reference to 8th Army circular embodying such prohibition.

[41] 14 CMR 316 (1954).

[42] ACM S–9686, 17 CMR 790 (1954).

The Court of Military Appeals has had occasion to deal with constructive knowledge in only one case.[43] The accused was charged with having failed to obey a company directive, in violation of Article 92(2).[44] In conformity with the provisions of the Manual,[45] the law officer charged the court that proof of actual knowledge of the order was not required, as proof of constructive knowledge would suffice. He then stated to the court that constructive knowledge existed "when the accused, by the exercise of ordinary care, should have known of the matter, *whether or not he did so in fact.*"[46] (Emphasis supplied.) The Court of Military Appeals rejected this concept of knowledge in Article 92(2) prosecutions, because first, such an instruction was capable of misleading the court-martial into believing that nonknowledge would be an acceptable substitute for actual knowledge, and second, the quoted instruction permitted a finding of guilt based on the accused's negligence in failing to acquaint himself with the directive allegedly violated. This instruction was based upon paragraphs 154*a*(4) and 171*b* of the present Manual[47] but appeared in the 1949 Manual only in relation to violation of general orders.[48] Research fails to disclose what caused the drafters of the Manual to apply the concept of constructive knowledge to the offense of "failure to obey," as such an application was not made in pre-1951 cases, and the service boards of review have refused to make use of this application.[49] It may be concluded then that the holding of the Court of Military Appeals in the *Curtin* case

[43] *U.S.* v. *Curtin*, 9 USCMA 427, 26 CMR 207 (1958).

[44] Although *U.S.* v. *Brown*, 8 USCMA 516, 25 CMR 20 (1957), had not been decided at the time of Curtin's trial, perhaps this mode of pleading violation of a company order, thus avoiding the problems that arose in the *Brown* case, was suggested by CM 363728, *McGee*, 11 CMR 346 (1953), an earlier case in which violation of a company directive was alleged under Article 92(2).

[45] Par. 171*b*, MCM, 1951.

[46] *U.S.* v. *Curtin*, 9 USCMA 427, 432, 26 CMR 207, 212 (1958).

[47] For provisions of par. 154*a*(4), MCM, 1951, see text relating to note 31. Par. 171*b*, MCM, 1951, provides for such knowledge "when it is shown that the order was so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order."

[48] Par. 140*a*, MCM, 1949.

[49] ACM S–6511, *Errico*, 11 CMR 823 (1953). This case concerned failure to obey a viva voce order. The board of review declined to speculate as to whether such knowledge was applicable solely to published directives, after finding it inapposite to the fact-situation described. In CM 359569, *Moffit*, 9 CMR 343 (1953), and CM 361544, *Rhea*, 10 CMR 268 (1953), each alleging a violation of Article 91(1), a board of review labeled as prejudicial an instruction that the court could convict if it found the accused "knew or had reason to know" that the person assaulted was his superior NCO.

reflects a view consistent with prior case-law and in conformity with current holdings of the service boards of review.

But what is the status of constructive knowledge in prosecutions under Article 92(1)? An implied approval of the application of the concept to general order violations is found in the *Snyder* case,[50] and again in the *Arnovits* case,[51] in which the instruction in *Snyder* was referred to in the following language: "In *Snyder* we said: 'Here the law officer properly instructed the court that *one of the necessary elements* of proof was that the accused had *knowledge*, actual or constructive, of the camp regulation allegedly violated' . . . . The law officer here gave no such instruction. His failure cannot—consistently with *Snyder*—be treated other than as error." Contrasted with this language are two instances in which, by way of dicta, the Court of Military Appeals has raised a question as to propriety of applying constructive knowledge to Article 92(1) violations. In the *Curtin* case, the Court, in disposing of a violation of Article 92(2), stated: "An instruction on constructive knowledge has no place in the court's deliberation upon an Article 92 offense."[52] And in the *Tinker* case, the majority opinion contained the provoking statement that "in a prosecution for a violation of Article 92, knowledge of a 'general order' *need not be alleged nor proved.*"[53] (Emphasis supplied.) The question now is whether the military lawyer is warranted in inferring from the above quotations a trend on the part of the Court to disavow the recognition accorded constructive knowledge in earlier cases. While this might be considered a fair inference, it can be argued more persuasively to the contrary. It is suggested that the dictum in *Curtin* should be treated (if in fact it does not arise from a typographical omission of "(2)" after the words "Article 92") as an inadvertence probably caused by the tremendous volume of decisions issued by this Court annually, which may render difficult detached reflection on the impact which any single opinion may have on prior case-law. The dictum in *Tinker* can be explained in the light of the authority upon which it is based. Because the quoted language is followed by a reference to the comparison of Article 92(1) to Article 92(2), the most logical explanation, and the only one consistent with decided cases, is that the author judge was writing in terms of actual knowledge, since it is clear that "constructive knowledge" is not knowledge at all but an excuse for proof of the same. It should thus be concluded that the Court of Military Ap-

[50] *U.S.* v. *Snyder*, 1 USCMA 423, 4 CMR 15 (1952).
[51] *U.S.* v. *Arnovits*, 3 USCMA 538, 13 CMR 94 (1953).
[52] *U.S.* v. *Curtin*, 9 USCMA 427, 432, 26 CMR 207, 212 (1958).
[53] *U.S.* v. *Tinker*, 10 USCMA 292, 27 CMR 366 (1959).

peals is not indicating an intent to reject the concept of constructive knowledge in prosecution for a violation of general orders. A conclusion that the Court is inclining toward according presumptive knowledge toward all general orders is a completely unwarranted interpretation of the *Tinker* dictum, as this would result in a major upheaval in the law, redounding to the disadvantage of the accused. The Court has never in the past invalidated a Manual provision beneficial to an accused, in such a way that the direct result of such invalidating action was detrimental to persons subsequently accused of Codal violations.[54]

In summary, it may be stated, then, that a general order may be issued only by the commander of a major command, i.e., who occupies a substantial position, and here there must be resort to case-law; no other commander may issue an order, noncompliance with which is cognizable under Article 92(1). An averment of knowledge is not required in pleading violation of a general order, but if the order is issued by a commander more than once-removed from the Department,[55] then proof of constructive knowledge is required. In failure to obey cases under Article 92(2), knowledge must be pleaded as well as proven, and here actual knowledge is required, although its existence may be established circumstantially. It can be but a short time before the Court will be requested to voice its views directly on the application of constructive knowledge to Article 92(1) violations. Thus, the lawyer practicing before courts-martial, and the staff judge advocate, who advises on the drafting of pleadings, will do well to remain alert for the final case which will bring certainty and stability to future prosecutions under Article 92.

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[54] While it might be suggested that the result of *U.S.* v. *Varnadore*, 9 USCMA 471, 26 CMR 251 (1958), and *U.S.* v. *Jobe*, 10 USCMA 276, 27 CMR 350 (1959), invalidating portions of par. 127*b*, MCM, 1951, may prejudice the accused, the author's view is that while the original intent of the drafters of the Manual was to benefit an accused, the application of these provisions by service lawyers effected an opposite result.

[55] If this phrase is recast as "a commander who reports directly to the Department," have we changed the rule in *Stone* and *Statham*, *supra*?

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BOOK REVIEW

The Law of AWOL by Alfred Avins, pp. 228, xxi Oceana Publications 1957.

The author of this book, which deals with the law relating to Article 86 of the Uniform Code of Military Justice,[1] attempts to fulfill a threefold need, intending his work for use by the law student, the lawyer, and the layman. In his preface, Mr. Avins indicates that the lay officer, particularly in disposing of offenses administratively,[2] or acting as a summary court-martial in the trial of minor offenses, will find the book most useful.

The book has three parts, a general introduction and orientation on the concepts involved in Article 86, a second part entitled "The Prosecution's Case," and the third part designated as "The Defense's Case." The Table of Contents lists the headings of the various sections making up each chapter, and the descriptive phrases are apt in most cases. The "Table of Authorities," some 30 pages in length, is excessively detailed, and oddly enough for such a table, the military cases are not compiled alphabetically but in chronological order of USCMA and CMR citations, thus making it impractical for research purposes.

Several basic faults are found in the book itself. First, the significance of some cases is not grasped by the author.[3] Second, parts of opinions are wrenched out of context to support textual statements by the author.[4] Third, unwarranted conclusions are drawn from the factual situations in cited cases in such a way as to lead the reader to regard those cases as supporting a freely asserted textual proposition.[5] These three faults are further compounded by the format, as a result of which it is often exceedingly difficult to separate a digested or excerpted opinion from the editorial comment or evaluation.

The gravest fault, however, exists apart from the book itself. The military lawyer is immediately aware that the author, though

[1] 10 U.S.C. 886 (1952 Ed., Supp V).

[2] By resort to nonjudicial punishment pursuant to 10 U.S.C. 815 (1952 Ed., Supp V).

[3] See, e.g., CM 226363, Beaucage, 15 BR 101 (1942), cited at p. 196 for "mistake of fact of authority." The case turns on the limits of a sentinel's post as comprehended in Article of War 86 and paragraph 146, MCM, 1928.

[4] See, e.g., Pereira, cited at p. 93, to show leave by operation of law. Here it was held that the accused was unjustly convicted for *desertion*, but the author fails to indicate that a charge of AWOL was barred by the statute of limitations (Art. 39 of 1920 Articles of War).

[5] See, e.g., ACM S–135, Wares, cited at p. 92, which raised only the question of whether the accused's disobedience was willful, and does not concern leave "by operation of law."

industrious and thorough in his approach, is not always on familiar ground. On almost every page, there is evidence that Mr. Avins is not fully acquainted with certain aspects of military law in general and military criminal law in particular. At various points in his work, and particularly in Chapter 5, subtitle "Who Can Give Leave," the author attempts to apply "Line of Duty" concepts to criminal cases arising under Article 86. Many statutes confer or deprive claimants of certain benefits, depending on the "line of duty" status. Thus, a commander is required, in every case of injury or disease suffered by service personnel, to establish, by investigation, whether such injury or disease was incurred in "line of duty."[6] Accordingly, a case such as CSJAGA 1949/4497, digested at page 91, does not support Mr. Avins' thesis that a person may grant himself leave. The reader is advised to disregard all other "line of duty" opinions cited in the book, particularly those such as the out-dated opinion appearing at page 232.[7]

Another indication of the author's lack of complete familiarity with military criminal law is found in his treatment of the affirmative defense of mistake of fact.[8] It can be stated generally that mistaken belief is not a defense unless it is of such a nature that the conduct would have been lawful had the facts been as they were reasonably believed to be.[9] The single authoritative case considering this defense as it applies to AWOL[10] limits mistake to honest and reasonable belief, expressing reasonableness in terms of the absence of simple negligence, placing on the defendant the duty to exercise ordinary care.[11] The mistake of fact referred to must be a mistaken belief by the accused and not an erroneous concept of some third party, such as Mr. Avins indicates in his discussion of the cases in this area. Further misconceptions arise in the author's extensive application of cases involving disobedience of, or failure to obey, orders. The mistake concept here is also misapplied.

In summation, it is concluded that this book, though commendably ambitious in scope, does not make a scholarly contribution to the field of military criminal law. While the excessive citing of ancient authorities lends it a scholarly gloss, such citations appear

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[6] AR 600–40, 5 November 1956 requires such determination in the Army Establishment.

[7] Dig. Ops. JAG 1912–1940, p. 973—Here an NCO, while AWOL, was killed while quelling an affray, and it was held that his death occurred "in line of duty, not due to misconduct."

[8] See Chapter 3.

[9] Perkins, Criminal Law, 826 (1957). The rule may be stated with more specificity according to the degree of mistake required.

[10] United States v. Holder, 7 USCMA 213, 22 CMR 3 (1956).

[11] Id. at 217, 22 CMR at 7 (1956).

to be of questionable value in interpreting Article 86. As is apparent from the "Table of Authorities," the author limited himself to Volumes 1–18 of the Court-Martial Reports in the field of contemporary case-law. Although his preface is dated 1 April 1957, he has not included several cases in the four volumes of Court-Martial Reports which had appeared prior to publication of this book, although they included many important opinions, particularly the one case on mistake of fact.

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